Supreme Court, U.S.
FILED

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No. _____ 09-275 AUG 31 2009

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In The

Supreme Court of the United States

RODEL E. RODIS,

Petitioner,

v.

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. 18 U.S.C. § 472 makes it illegal to pass a *counterfeit bill* with intent to defraud. An innocent passing of counterfeit currency does not violate the statute. Did the Ninth Circuit err in concluding that Respondent police officers, who admit they did nothing to determine Petitioner's intentions, did not have to do so because the mere act of passing a *suspected counterfeit bill*, by and of itself, furnish police officers with sufficient probable cause to arrest an individual pursuant to 18 U.S.C. § 472, even if the arresting officers have absolutely no evidence of intent to defraud and in fact have an abundance of evidence under the totality of circumstances to conclude that there was no criminal intent whatsoever regardless of the actual authenticity of the bill?

2. The Ninth Circuit cited *Hunter v. Bryant*, 502 U.S. 224 (1991), and reiterated that "[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." Did the Ninth Circuit err in concluding that Respondents are entitled to qualified immunity for civil rights claims brought against them under 42 U.S.C. § 1983 when it focused solely on the "plainly incompetent" clause of *Hunter* and completely ignored the clause "those who knowingly violate the law," even where Petitioner has asserted numerous facts which, if viewed in the light most favorable to him as mandated by *Saucier v. Katz*, 522 U.S. 194 (2001), should have been more than sufficient to constitute as intentional violations of his constitutional rights?

PARTIES TO THE PROCEEDING

Petitioner Rodel E. Rodis is an attorney in private practice who has been a member of the State Bar of California since 1980. At the time of his arrest, he was an elected public official of San Francisco who had been serving as a member of the Board of Trustees of the City College of San Francisco since 1991, an active community leader holding high positions in various socio-civic organizations, and a regular columnist in several Asian-American publications.

Respondents are two individual law enforcement officers (Sergeant Jeff Barry and Officer Michelle Liddicoet), the City and County of San Francisco (a California municipality), and former Chief of Police Alex Fagan sued in his official capacity only.

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OPINIONS/ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated March 9, 2009, is published at 558 F.3d 964 and is reprinted in the Appendix at Pet. App. 1.

The order of the United States District Court for the Northern District of California dated March 22, 2005, can be found at 2004 WL 3246273 (N.D. Cal.), and is reprinted in the Appendix at Pet. App. 14.

The opinion of the United States Court of Appeals for the Ninth Circuit dated August 28, 2007, is published at 499 F.3d 1094 and is reprinted in the Appendix at Pet. App. 31.

The order of the United States Court of Appeals for the Ninth Circuit dated April 17, 2009, denying Petitioner's petition for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 63.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the March 9, 2009, opinion of the Court of Appeals for the Ninth Circuit reversing the district court's order denying qualified immunity to Respondents. Petitioner filed a timely petition for rehearing and rehearing en banc, but the court of appeals denied the petition on April 17, 2009. The Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18 U.S.C. § 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On February 17, 2003, at around 7:00 p.m., Petitioner performed the everyday action of paying in a neighborhood retail store with U.S. currency when he attempted to purchase several items at his local Walgreens store with a $100 bill, 1985 series. The bill he used did not appear unusually old or wrinkled, and it had the normal texture of other $100 bills he had in his possession, all of which were genuine. Nonetheless, the 21-year-old clerk suspected the bill was counterfeit, even after testing it with the counterfeit detector pen which showed that the bill was genuine. The clerk reported her suspicion to the store manager, Mr. Dennis Snopikov, who re-examined the bill with the same counterfeit detector pen which again indicated that the bill was genuine. Mr. Snopikov called 911 and reported that he had suspicions about a bill, that he was not sure but that

he thought it might be counterfeit. While Mr. Snopikov was making the call, Petitioner completed the transaction with another $100 bill.

When the first two San Francisco Police Department (SFPD) police officers, Sgt. Jeff Barry and Officer Barbara Dullea, arrived at the scene, Sgt. Barry immediately recognized Petitioner but made no attempt to approach either Petitioner or Mr. Snopikov, who were having a civil conversation. Sgt. Barry knew that Petitioner was a lawyer and a publicly elected member of the Community College Board of the City College of San Francisco (CCSF). Sgt. Barry also personally knew Petitioner because Sgt. Barry had headed the boys' athletic program of the parochial school where their sons were classmates. The last time they spoke, they had a heated argument: Sgt. Barry had accused Petitioner of placing Sgt. Barry's brother-in-law, a police officer at CCSF, at risk of physical harm, allegedly because Petitioner and the other CCSF Trustees did not allow CCSF police officers to carry firearms on campus.

Even though the 911 call only involved a possible counterfeit charge, Sgt. Barry called for backup to a second squad car and waited at the door of the store. When the officers in the second car, Officers Michelle Liddicoet and James Nguyen, arrived, they conferred with Sgt. Barry, the ranking officer at the scene. Sgt. Barry informed Officer Liddicoet that Petitioner was a lawyer and an elected public official who did not like police officers.

Officers Liddicoet and Nguyen thereafter entered the store and proceeded to place handcuffs on Petitioner. But just before placing the handcuffs on Petitioner, Officer Liddicoet spoke with Petitioner while Officer Nguyen spoke briefly with Mr. Snopikov.

Mr. Snopikov told Officer Nguyen that he had compared Petitioner's $100 bill with what he knew to be a genuine bill, with watermark and a magnetic strip, and that he was uncertain about the authenticity of the bill Petitioner had used. Officer Nguyen, however, did not bother to look at the "genuine" $100 bill to which Mr. Snopikov said he had compared it. Officer Nguyen also did not engage in any investigation whatsoever to determine Petitioner's intent.

Like Officer Nguyen, Officer Liddicoet did not speak to the Walgreens employees to learn what had really happened; she did not inspect the $100 bill Petitioner used to complete his purchases or any other bills he had in his possession at the time; and she did not inspect the $100 bill to which Mr. Snopikov had compared the suspected bill.[1] Then,

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[1] The opinion's Factual and Procedural Background states that "[t]he officers tried the counterfeit detector pen on a folder" and that "the marking . . . indicated that the folder was also genuine United States currency." Pet. App. 3-4. Petitioner asserts that this "fact" never happened prior to his arrest at Walgreens as the cashier who had the pen was never interviewed at the scene and the pen remained with her at the counter. It is also a "fact" that was never mentioned in the panel's own 2007 decision. Because this is a qualified immunity

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without taking any time to verify any information about the situation, or assess if Petitioner thought that the suspected bill was fake and was intending to defraud Walgreens with it, Officer Liddicoet proceeded to ask Petitioner for his driver's license. When Petitioner told her he was an attorney and that his office was just one block away, Officer Liddicoet told Petitioner that she knew who he was and that he "should be ashamed" of himself. Officer Liddicoet then asked Petitioner to put his hands behind his back and thereafter placed handcuffs on him, in full public view, even though Petitioner was not trying to argue, flee, or cause any breach of the peace.

Thereafter, Petitioner was brought by Officers Liddicoet and Nguyen to their squad car and made to sit in the back of the car. Sgt. Barry then approached Officer Liddicoet and requested her in a low voice to make sure that his name was not mentioned anywhere in the police report. Officer Liddicoet answered Sgt. Barry affirmatively.[2] Petitioner was then transported to a police station with his hands shackled behind his back and his knees pressed up against the back of the front seat of the car.

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case, the panel needed to take the facts based on the allegations of Petitioner. *Saucier v. Katz*, 522 U.S. 194, 201 (2001).

[2] Petitioner overheard the conversation because of the handcuffs behind his back which made him lurch his head forward. However, Officer Nguyen, who was unaware of the request, prepared the police report and it ended up mentioning the role of Sgt. Barry at the scene anyway.

At the police station, Petitioner was placed in a holding area with one of his wrists handcuffed to a metal bar. Petitioner requested to make a telephone call to his wife to tell her of his whereabouts, but he was told he was not allowed to make any call to anyone. Petitioner reminded the officers about his legal rights as an arrestee but they ignored him.

Officer Nguyen then called the U.S. Secret Service to inquire about the suspected bill but was unable to speak with an agent immediately, so he asked for a return call. After about thirty minutes, a Secret Service agent returned the call, discussed the details of the suspected bill with Officer Nguyen, and concluded that the bill was in fact genuine.

Sometime thereafter, Petitioner was released from custody, and Officer Nguyen drove him back to Walgreens. At the time Petitioner was released, Officer Nguyen admitted to Petitioner that he knew all along that the bill was real and that he told the other officers that he thought it was real.

As a result of his arrest at the store, the drive to the station, and the detention at the station, Petitioner suffered humiliation, injuries to his back which required chiropractic care, injuries to his wrist, and emotional distress.

After the incident, the SFPD issued a formal memorandum clarifying specific procedures when investigating suspected counterfeit currency incidents. The clarified policy requires police officers to

conduct an investigation into the element of intent as a necessary part of the crime.

II. PROCEDURAL BACKGROUND

On October 1, 2003, Petitioner filed a complaint against the City and County of San Francisco, then Chief of Police Alex Fagan, Sgt. Barry and Officer Liddicoet under 42 U.S.C. § 1983 for false arrest and excessive force in violation of his Fourth Amendment rights, conspiracy to violate said rights, injunctive relief, and several state law claims.

On February 11, 2005, Respondents moved for summary judgment, and on March 22, 2005, the U.S. District Court for the Northern District of California granted the motion as to Petitioner's conspiracy, municipal liability and injunctive relief claims, but denied the motion in all other respects after finding that, because the officers lacked any evidence regarding Petitioner's intent to defraud, probable cause was necessarily lacking and the arrest was therefore unlawful. The district court also found Sgt. Barry and Officer Liddicoet not entitled to qualified immunity because the illegality of the arrest was clearly established at the time.

Respondents filed an interlocutory appeal to the Ninth Circuit, and on August 28, 2007, the court affirmed the district court's decision after hearing oral argument. Respondents then filed a petition for rehearing and rehearing en banc but the court denied the petition on February 6, 2008.

Subsequently, Defendants filed a petition for a writ of certiorari with the Court. Without issuing an opinion, the Court granted the writ on January 26, 2009, vacated the 2007 order of the panel, and remanded the case back to the Ninth Circuit for further consideration in light of *Pearson v. Callahan*, 555 U.S. ___, No. 07-751, slip op. 1 (Jan. 21, 2009).

On March 9, 2009, the Ninth Circuit panel issued its order reversing its own August 28, 2007, decision. In its opinion, the panel noted that "[p]ossession of counterfeit currency is a specific intent crime" and that "it was clearly established that [Respondents] were required to have probable cause of Rodis's specific intent to defraud the store for a lawful arrest." Pet. App. 10. However, the panel found that "[i]n evaluating the totality of circumstances in this case," it was "embark[ing] on unchartered waters" because the Ninth Circuit "has never addressed" the issue of whether the probable cause requirement as to an arrestee's intent to defraud is met "based solely on the evidence suggesting that the bill might have been fake." Pet. App. 10-11. The panel also found that "[a]ll of the other circuits to have answered this question . . . have found that '[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note.'" Pet. App. 11 (citations omitted). Then, the court concluded by saying that "[a]ssuming that tender of a counterfeit bill was enough to establish probable cause . . . we cannot say that the officers' belief that [the bill] was

fake was plainly incompetent" and thus the arrest "was not clearly established as unlawful." Pet. App. 12-13.

Petitioner filed a timely petition for rehearing and rehearing en banc, but the appeals court denied it on April 17, 2009. Pet. App. 63.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS FINDING THAT ALL THE OTHER CIRCUITS TO HAVE ANSWERED THE QUESTION OF WHETHER THE MERE PASSING OF A SUSPECTED COUNTERFEIT BILL IS SUFFICIENT TO CONSTITUTE PROBABLE CAUSE UNDER 18 U.S.C. § 472 HAVE RULED IN THE AFFIRMATIVE.

Under *Saucier v. Katz*, 522 U.S. 194 (2001), the Court required a two-step sequence of analyzing qualified immunity cases. According to *Saucier*, the first step is to ask whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. Then, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.*

The Court revisited this analytical framework in *Pearson* in which the Court wrestled with the "consent-once-removed doctrine" and held that while it is "often beneficial," the *Saucier*'s analytical framework in analyzing qualified immunity cases "should no longer be regarded as mandatory." Slip op. at 10-11.

Following the Court's remand of this case to the Ninth Circuit in view of *Pearson*, the panel concluded, just as in 2007, that "it was clearly established that [Respondents] were required to have probable cause of [Petitioner's] specific intent to defraud the store for a lawful arrest." Pet. App. 10. However, the panel went on to reverse its 2007 decision by holding that "regardless of whether we determine that evidence beyond the tender of a counterfeit was required, [Respondents] are entitled to qualified immunity" because "other circuits have found that the passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note." Pet. App. 11-12 (citations and quotations omitted).

Notably, the panel's opinion is relatively short. This is so because the panel did not review the factual contexts and totalities of circumstances in the out-of-circuit cases it cited, which supposedly stand for the above-mentioned proposition that the mere passing of a counterfeit note coupled with identification of the person who passed the note supplies sufficient probable cause to arrest the passer of the

note. In fact, it did not mention a single fact about any of the cases. If it had, a different conclusion would have emerged: i.e., that probable cause as to the intent element beyond the mere act of tendering the bills in fact did exist in each of the cases cited. Because the facts differentiating these cases to Petitioner's are critical, these cases warrant close examination here, as follows:

A. ***United States v. Everett,*** 719 F.2d 1119 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984). The panel misread the finding in this case where the defendant-appellant was "appeal[ing] from judgments of conviction on four counts of conspiracy to pass counterfeit currency, passing counterfeit currency, possessing counterfeit currency, and concealing counterfeit currency." *Id.* at 1120. The Eleventh Circuit did say that "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause," but the opinion does mention that "appellant and another individual, who were seated at the same table in a lounge, each passed $50.00 *bills* which were *identified by a deputy sheriff to be counterfeit.*" *Id.* (italics added). The statement is definitive: the "*bills* . . . were *identified by a deputy sheriff to be counterfeit*," not *suspected to be counterfeit.*

The difference between a single bill and multiple bills, and between actual counterfeit bills and suspected counterfeit bills, is enormous. It is reasonable to see how a conspiratorial impression may be evoked in any reasonable person by witnessing two individuals

separately tendering $50 *bills* (note the use of the plural) in a lounge, plus the conclusive identification by the deputy sheriff of these bills to be counterfeit, thus distinguishing *Everett* from Petitioner's case. Thus, even though the two-paragraph opinion is bereft of facts, it is reasonable to conclude that the appellate court, not wishing to disturb the judgments of conviction, simply deferred to the factual conclusions of the trial court and therefore did not see it necessary to elaborate any further.[3]

Further, the panel compounded its misreading of *Everett* by citing it as collecting cases of similar findings, including *United States v. Savage*, 564 F.2d 728 (5th Cir. 1977); *United States v. Maryland*, 479 F.2d 566 (5th Cir. 1973); *Dailey v. United States*, 365 F.2d 640 (10th Cir. 1966); and *United States v. Masini*, 358 F.2d 100 (6th Cir. 1966).[4] However, the

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[3] A U.S. Magistrate issued a *Report and Recommendation* dated July 26, 1982, which found that the arrest of Everett and his companion occurred shortly past midnight of June 9, 1982, at a liquor store/bar and that prior to the arrest, the lounge manager and the arresting officer had confirmed that the bills, separately tendered by the two men who were sharing a small table in front of the lounge, both bore the same serial number and were noticeably smaller or shorter in length than genuine currency. A later search revealed that each arrestee had 3 other similar $50 bills in their persons and that more $50 bills were hidden under the floor mat of their car. Excerpts of Record at 48-51, *Everett*, 719 F.2d 1119 (No. 82-55-Cr-J-M).

[4] The other cases cited in *Everett* are *United States v. Ayers*, 426 F.2d 524 (2nd Cir. 1970), cert. denied, 400 U.S. 842 (1970), and *United States v. Smith*, 357 F.2d 318 (6th Cir. 1966), both of which, because the panel's 2009 opinion cited them directly, are

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facts of the cases cited in *Everett* are likewise easily distinguishable, as follows:

(1) In *Savage*, a pizza delivery man called the Daytona Police Department at approximately 1 a.m. after he became suspicious of the bill he received from the defendant who was in a room at a Ramada Inn in Daytona Beach. 564 F.2d at 729. The officer who

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discussed separately infra. *Everett* also cited the Ninth Circuit case *United States v. Blum*, 432 F.2d 250 (9th Cir. 1970), which involved a defendant arrested in 1968 by a Louisiana state trooper who responded to a police captain's broadcast urging officers to be on the lookout for a "wanted" suspect who was driving an identified vehicle with California plates for passing counterfeit bills at a gas station. There was particular concern because "[p]rior to this incident, an item had appeared in the local newspaper that counterfeit bills were being passed in the community." 432 F.2d at 252. (A post-arrest search of the defendant's vehicle revealed a bag "containing about $15,000.00, a gun, ammunition, polo shirt, cap, glasses and a sock." *Id.* at 253.) However, as the panel noted in its 2007 opinion, the arrest in *Blum* "is easily distinguishable" from Petitioner's because "numerous facts – such as the suspect fleeing the scene and the fact the suspect lived outside the state – could have been enough to create a 'fair probability' he passed counterfeit bills." Pet. App. 46 n.5. Additionally, the panel stated that "*Blum* is an old case, and since it was decided . . . , we have made clear that (1) 'the key element of section 472 is the specific intent to defraud,' and (2) 'when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred.'" *Id.* (citations omitted). The panel repeated this point in its 2009 opinion in which it dismissed the precedential value of *Blum* and other in-circuit cases which predate *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), "the first case to address the interplay between specific intent and probable cause." Pet. App. 11 n.1.

answered the call "decided that the bill probably was counterfeit, but desiring a third opinion, contacted" his sergeant, one Sgt. Adkins, who, unlike Sgt. Barry in many respects, "agreed, but suggested that the occupants . . . could be tourists who had unknowingly been passed the bill and then, also unknowingly, had themselves passed it" to the pizza delivery man. The three then went to the hotel room simply "to request that the bill be replaced" at "approximately 2 a.m." but "[t]he young female occupant of the room, refused to let them in, stating that the man who had paid for the pizzas was out to buy cigarettes." *Id.* When the trio left to search for the defendant by automobile, failed, and returned to the motel lobby, the motel switchboard operator called one of the officers over and related to the officer a suspicious "conversation she had overheard on the motel switchboard." *Id.* at 730. The totality of circumstances here led the officers to arrest the defendant and his girlfriend and later search their motel room, which yielded approximately $23,000 in counterfeit twenty-dollar bills. *Id.*

(2) In *Maryland*, a Louisiana liquor store owner, upon discovering two counterfeit twenty-dollar bills in his cash register on that evening of April 4, 1969, immediately filed a complaint with the Ouachita Parish Sheriff's Department in which "he stated his belief that members of a group of four Negroes, two men and two women, who were travelling in a 'black and white vinyl over green Cadillac' had passed the bills." 479 F.2d at 569. The department then "broadcast a radio message to other

law enforcement agencies in the area describing the suspects and the automobile, stating that they were suspected of passing the counterfeit bills, and requesting other law enforcement officers to arrest them. A Bienville Parish Deputy Sheriff received this radio request and complied with it by arresting appellant and his companions, who were travelling in the distinctively described automobile, only a short time after the crime had occurred." *Ibid.* In his appeal, the defendant argued that the admission of counterfeit bills as evidence against him was improper because the bills were obtained by an unlawful search, but the Fifth Circuit ruled that the warrantless arrest of the defendant was valid because "the Deputy Sheriff who actually made the arrest was entitled to rely on the radio bulletin which originated from the Ouachita Parish Sheriff's Department." *Id.* (citations omitted).

(3) In *Dailey*, the defendant-appellant, "late in the day on August 18, 1965," purchased some tablets at a pipe shop in the Gladstone Hotel in Casper, Wyoming, "and paid for them with a $20.00 counterfeit bill." 365 F.2d at 640. An investigation by the police after the incident was reported "turned up three similar bills that had been recently passed in and around Casper, one of them at the Virginia Bar, another at the Avalon Club, and the third at a café." *Ibid.* The defendant was later "arrested when he answered the knock of a police officer on the door of his room at the Gladstone Hotel and was immediately identified by the pipe shop owner and by the

bartender at the Virginia Bar, who had accompanied the officer, as the man who had passed the counterfeit bills at those places." *Id.* at 641. Fifteen counterfeit $20 bills were later found after a search of the defendant's hotel room was conducted. The Tenth Circuit ruled the arrest lawful because "[a] crime had been committed, the officers knew it, and the appellants were identified as the persons who had committed it by individuals in a position to know." *Ibid.*

(4) In *Masini*, the defendant-appellant "purchased two paperback books at a Memphis bookstore, using a counterfeit $20 federal reserve note and receiving the difference in change." 358 F.2d at 101. Immediately, the proprietor of the bookstore, who knew that "the Memphis police had been alerted that passers of counterfeit $20 bills were active in the area," became suspicious that the $20 bill was counterfeit because its color and paper "did not look right." He then "went to the sidewalk outside the store, saw appellant waiting for a traffic light, and called for him, but appellant *ignored* the call and proceeded across the street." *Id.* at 101-102 (italics added). After asking his brother to come and keep the store, the proprietor and a traffic policeman looked for the defendant and found him in the lobby of the Peabody Hotel. The defendant denied that he had passed a bill or had been in the bookstore but upon positive identification by the proprietor, the traffic officer placed the defendant under arrest. Subsequent to the arrest, a search of the defendant's person

revealed three more counterfeit bills while a search for his hotel room "revealed a paper bag with appellant's name on it which contained 384 counterfeit bills." *Id.* at 102. Citing Tennessee law under which an officer is authorized to make a warrantless arrest upon a charge made, upon reasonable cause, of the commission of a felony by the person arrested, the Sixth Circuit held that there was probable cause for the arrest in this 1966 case under the circumstances. *Id.*

B. ***United States v. Armstrong***, 16 F.3d 289 (8th Cir. 1994). Here, the two defendants-appellants, Armstrong and Kuhn, each tendered a $20 bill for separate small purchases ($1.59 and $1.27 respectively) at a Dairy Queen in a touristy area in South Dakota. 16 F.3d at 291. Suspecting the bills to be counterfeit, the owner's wife, who "had previously received training in recognizing counterfeit money" and was manning the till, called the local police chief, who then "advised her to take the bills to the bank." *Id.* After "bank employees confirmed that the bills, which had identical serial numbers, were counterfeit," the shopkeeper brought the bills to the police chief and the two proceeded to locate the defendants, one of whom, Kuhn, was spotted riding his motorcycle. When the policeman asked Kuhn to empty the contents of his pockets and show him his wallet, the policeman "found in it a large amount of genuine currency and a number of counterfeit $20 bills, which were separated from the real money." *Id.* at 292. Thereafter, "Kuhn was placed under arrest and

transported to the police station," on the way to which Armstrong was also spotted, identified, and likewise arrested. *Ibid.*

C. ***United States v. Hernandez,*** 825 F.2d 846 (5th Cir. 1987). Here, the officers accosted Hernandez and his companion after being tipped off by a vendor in a carnival who earlier refused to change a twenty dollar bill he suspected of being counterfeit. 825 F.2d at 848. However, the officers had numerous reasonable bases for probable cause and effecting a subsequent arrest because (a) initially, "[a]s the officers approached, Hernandez and his companion started away" and returned only after the officers called to the suspects to come back and answer some questions; (b) when one of the officers conducted a pat-down search, felt "a crumpled piece of paper" in Hernandez's pocket, and asked what it was, "Hernandez replied that it was nothing and twice refused to show the paper"; and (c) when the officer reached into the pocket, he "retrieved a black and white mimeograph copy of a twenty dollar bill." *Id.*

D. ***United States v. Allison,*** 616 F.2d 779 (5th Cir. 1980). Here, a deputy sheriff stopped the defendants-appellants' car for investigation after he received a radioed report from his police chief that "one of the occupants had tried to pass a counterfeit $20.00" at a self-service gas station for $2.38 worth of gasoline. 616 F.2d at 781. After Allison "produced a $20.00 bill" from his billfold, and when asked if he had any more, "produced two additional counterfeit $20.00 bills," the deputy sheriff placed him under

arrest and gave him Miranda warnings. *Id.* A subsequent search of the car's trunk yielded "a travel shaving kit containing 117 counterfeit $20.00 bills" and another counterfeit $20 bill in the back seat of the auto. *Id.* The Fifth Circuit pointed out that "[a]lthough mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed." *Id.* at 782. In its decision to affirm Allison's conviction, the court concluded that the deputy sheriff had probable cause to arrest because Allison exhibited not just one but "three counterfeit $20.00 bills." *Id.*

E. ***United States v. Trotter***, 433 F.2d 113 (7th Cir. 1970). Here, a bartender at a tavern (a) received a suspicious $10 bill from the defendant-appellant and his female companion as payment for drinks at about 1:15 a.m. on March 16, 1967; (b) "followed the couple out to the street"; (c) "saw the defendant throw some keys at a man sitting on a passenger side" of an old station wagon without license plates; (d) overheard the male passenger who said he would "shoot the son of a bitch" before the suspects left in the car; and (e) thereafter reported the incident to a police officer in a squad car. 433 F.2d at 114-115. The officers who later arrested the defendant, after a search yielded two $10 bills which had the same serial number, were responding to a radio message about the incident, the description of the station wagon and the suspects, and the possible presence of

a gun. *Id.* at 115. In the pre-arrest search of the defendant, the police noticed that "actual currency taken from one of his pockets was carefully kept separate from the two counterfeit bills taken from another pocket." *Id.* at 116. Thus, in reviewing the evidence surrounding the arrest, the Seventh Circuit found without qualification that "it is apparent that the arresting officers had reasonably trustworthy information sufficient to warrant a belief in one of reasonable caution that an offense had been committed by this defendant to justify his warrantless arrest." *Id.* at 115.

F. ***United States v. Smith,*** 357 F.2d 318 (6th Cir. 1966). Here, a deputy sheriff who was also a part owner of a drive-in establishment refused to cash a $10 bill for the defendant who had earlier also tendered a $20 bill to pay for a ninety-three cent purchase with a clerk in the same store. 357 F.2d at 319. Noticing that both bills "neither felt nor looked genuine," the deputy sheriff/part-owner attempted to stop the defendant but before he could do so, the defendant had been driven away by his companion. *Ibid.* After the $20 bill was taken to a local bank president who also thought that it was bogus, the deputy sheriff procured a "John Doe" arrest warrant for the defendant, leading to a radio broadcast of the defendant's description and the car he was riding. When two policemen in separate cars later arrested the defendant after giving chase and his car was searched, 50 counterfeit bills were discovered. *Id.* Viewing the facts in its entirety, the Sixth Circuit

held that the existence of probable cause for the warrant here was "unquestionable" and that failure of the officers, after hearing the official broadcast of the warrant, "to take summary action under such circumstances would have amounted to sheer lunatic neglect of duty as well as non-feasance." *Id.* at 320 (citation omitted).

G. ***United States v. Ayers***, 426 F.2d 524 (2nd Cir. 1970), cert. denied, 400 U.S. 842 (1970). The defendant-appellant was arrested with two other men on May 1, 1968, after their car was stopped by a state trooper who had earlier received a message over the radio that the men had passed counterfeit currency and were driving in the identified car with the same license number. 426 F.2d at 529. The radio message was sent after an employee at an upstate New York Woolworth's reported receiving a bogus bill from one of the men, who "disappeared without waiting for his change, leaving behind a paper bag containing 3 cups full of coffee," when the manager attempted to accost him. *Id.* at 525. While the trooper simply acted as a "custodian" by resorting to a ruse until the sheriff and a lieutenant arrived to make the arrests, the Second Circuit ruled that the trooper, "as a prudent man, would have had probable cause to make the arrests by reason of the message he received." *Id.* at 530. After an investigation, the defendant and his companions were later found to be in possession of approximately 80 more counterfeit bills all bearing the same serial number as the one used at Woolworth's. *Id.*

Given the above-outlined facts in the cited cases, it cannot be reasonably said that the factual circumstances in any of the cited cases are similar to Petitioner's and that they support the conclusion that the mere passing of a *suspected* counterfeit bill and identification of the passer are enough for probable cause. In fact, quite the opposite is true: **In each and every cited case, there is ample probable cause under the totality of circumstances to support an arrest. In each and every cited case, there is a guilty counterfeiter.**

The panel did not account for the distinguishing facts in Petitioner's case critical to its just resolution. For instance, the relevant cases cited by the panel ALL involved truly counterfeit bills; not one case involved a suspected counterfeit bill. The panel also did not cite a single case where, as here, the suspect's bill was actually established to be genuine at the place where he attempted to use the bill, such as by using a commercially marketed, and presumably scientifically tested, counterfeit detector pen. The panel, instead, cited cases where the factual context, for instance, revealed that the supposedly comparable incident happened during an inopportune time, or a radio broadcast was definitive that a crime had been committed, or the suspect had multiple counterfeit bills in his person or appeared to be fleeing, et cetera – all of which, taken together, supply an arresting officer more than sufficient probable cause to arrest.

Moreover, in each and every cited case, there is a suspicious character. The panel did not cite a single

case where the arrested suspect, like Petitioner, had personal circumstances which tended to prove that he did not possess an intent to defraud: e.g., suspect is (a) a lawyer; (b) an elected public official with strong ties to the community; and (c) in possession of other genuine bills, one of which he used to complete the transaction. These facts were known to the arresting officers at the time of Petitioner's arrest, and the panel's 2007 opinion actually noted these facts, Pet. App. 42, even where its 2009 opinion did not.

Unlike the cases cited above where the "intent to defraud" element was easily inferable from the factual contexts surrounding the arrests, it is clear, and Respondents admit, that the question of whether Petitioner possessed any "intent to defraud" was never investigated at all. Instead, Petitioner was arrested by one officer who actually thought the bill was real all along (Officer Nguyen), one who did not make any effort to inspect it or establish that Petitioner might have known the bill might be fake (Officer Liddicoet), and one who was deliberately standing where he was too far away to see it (Sgt. Barry). Again, while the 2009 opinion is silent on this issue, the 2007 opinion in fact significantly noted that "the dearth of evidence regarding the mens rea elements is not surprising given that (1) the officers did not even attempt to investigate Rodis's state of mind before arresting him, and (2) the bill was in fact genuine." Pet. App. 41-42.

The Court in *Pearson* counsels, and Petitioner agrees, that where there is a "divergence of views"

among the circuits regarding the constitutionality of the alleged misconduct, it would be unfair to hold public officials liable. Slip op. at 20. As outlined above, however, any divergence of views here is illusory and was newly created by the panel with its latest decision which erroneously misread the cited cases.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE NINTH CIRCUIT'S CONCLUSION THAT RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY BASED ON ITS ANALYSIS WHICH FOCUSED ON THE FIRST HALF OF THE *HUNTER* STANDARD AND COMPLETELY IGNORED THE SECOND HALF.

In its opinion, the panel cited *Hunter v. Bryant*, 502 U.S. 224, 229 (1991), reiterating that "[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but **the plainly incompetent** OR **those who knowingly violate the law**." Pet. App. 12 (emphasis added). With *Hunter* in the background, the panel went on to conclude that "[a]lthough the arrest was unfortunate," it cannot be said "that the officers' belief that [Petitioner's $100 bill] was fake was plainly incompetent." Pet. App. 13.

However, the sole basis for probable cause as found by the panel in a roundabout fashion to support the conclusion that the arrest was not "plainly

incompetent" is that "[i]t is undisputed that Rodis's $100 bill looked odd, and that it lacked many modern security features." Pet. App. 12-13. This finding is factually incorrect because Petitioner did not think it looked odd and one of the arresting officers, Officer Nguyen, in fact admitted that he actually had thought all along that the bill looked genuine.[5] This analysis is also tepid because the officers' investigation, if not plainly incompetent, was plainly haphazard. Viewed even in the light most favorable to Respondents, the best the officers had was reasonable suspicion, but "[m]ere suspicion . . . or even strong reason to suspect" is "not enough" to find probable cause. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1498 (9th Cir. 1996) (citations omitted). This is so because "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity

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[5] Moreover, District Court Judge Maxine Chesney noted in her earlier decision that Officer Liddicoet also answered "yes" when she was asked at her deposition whether the bill looked real to her and that Sgt. Barry testified that he did not handle the bill himself and was actually 10 to 50 feet away from the officers handling the bill (although he stated in his deposition that he was certain Mr. Rodis was using a counterfeit bill). Pet. App. 17 n.3. Of the four officers, only Officer Dullea actually claimed that the bill "appeared odd," *id.*, but Petitioner disputes her ability to make such a claim because it is Petitioner's recollection that Officer Dullea, like Sgt. Barry, did not even approach either Petitioner or Mr. Snopikov, much less examine the bill prior to the arrest.

or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama v. White*, 496 U.S. 325, 330 (1990).

More importantly, the panel's analysis is facially deficient because it only addresses the first half of the *Hunter* test ("the plainly incompetent") and completely ignores the second ("those who knowingly violate the law"). Petitioner has alleged sufficient facts to support his contention that Sgt. Barry knowingly violated the law with the assistance of his subordinates. These facts should have been viewed, as mandated by *Saucier v. Katz*, 522 U.S. 194, 201 (2001), in the light most favorable to Petitioner as the plaintiff in an action involving qualified immunity as an affirmative defense. *Pearson* did not overrule this mandate, and it remains a logical rule because the grant of qualified immunity affords public officials the entitlement not to stand trial or face the other burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In *Wood v. Strickland*, 420 U.S. 308, 322 (1975), the Court held the defendants should not be immune from liability for damages under 42 U.S.C. § 1983 if "[they] knew or reasonably should have known that the action [they] took within [their] sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if [they] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."

(*See also Procunier v. Navarette*, 434 U.S. 555, 562 (1978), in which the Court described *Wood v. Strickland* as a two-part test under which the defendant could be liable either because he knew or should have known his conduct violated a clearly established constitutional right, OR because the defendant acted with malicious intent to deprive the plaintiff of a constitutional right.)

By focusing solely on the "plainly incompetent" test in *Hunter* and ignoring the clause "those who knowingly violate the law," the panel neglected to address a critical point of Petitioner's lawsuit. Petitioner is not only asserting that Defendants' conduct had no legal basis; Petitioner is also contending that the officers, led by Sgt. Barry, knowingly committed an impermissible, illegal act to humiliate him and get back at him for, among others, his "dislike of cops."

Petitioner repeatedly and unambiguously asserted in his pleadings that Sgt. Barry had an ax to grind with him because of an earlier incident in which they had a confrontational and heated argument. Thus, why Sgt. Barry made a radio call for a backup squad car when he and his partner could have easily accosted Petitioner, who was not trying to flee, not causing a breach of the peace, not suspected of a violent crime, and not reported to be in possession of any weapon; why he did not want his name to appear on the police report; why he did not approach the suspect; why he did not make any investigation whatsoever, no matter how perfunctory; why he falsely told Officer Liddicoet that Petitioner "dislikes

cops"; why he caused Petitioner to be immediately handcuffed at the store, in the car and at the holding station, and denied the ability to make a phone call; why he testified in his deposition that he was certain the bill was counterfeit even though he was 10-50 feet away – these are some of the many questions that have to be answered because they are all very much relevant to the issue of whether Sgt. Barry knowingly violated the law. At trial, Sgt. Barry may contest these allegations with his evidence, but in determining whether qualified immunity should apply, the *Saucier* mandate is for the panel to have viewed these facts in the light most favorable to Petitioner. Because the panel did not do so, it committed reversible error.

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE REGARDLESS OF WHETHER *SAUCIER*'S ANALYTICAL FRAMEWORK OR *PEARSON*'S IS FOLLOWED IN THIS CASE, THE RESULT SHOULD BE THE SAME BASED ON A REASONABLE INTERPRETATION OF THE LANGUAGE, HISTORY, CONGRESSIONAL INTENT, PUBLIC POLICY AND DECISIONAL LAW SURROUNDING THE STATUTE AND ITS ENFORCEMENT.

The language of Section 472 specifically contains the phrase "intent to defraud" as an element of the crime. The phrase modifies several verbs following it, such as "passes," "utters," "publishes," "sells,"

"attempts to pass," "keeps in possession," among others. 18 U.S.C. § 472. Thus, the panel correctly noted in both its opinions that "[p]ossession of counterfeit currency is a specific intent crime." Pet. App. 10; *see also* Pet. App. 39-40 (citations omitted). Additionally, the panel also correctly ruled in both opinions that "it was clearly established that the Defendants were required to have probable cause of Rodis's specific intent to defraud the store for a lawful arrest." Pet. App. 10; *see also* Pet. App. 44.

Over the course of two centuries, the Court has set forth in a long line of cases authoritative guidelines regarding what constitutes sufficient probable cause to make an arrest. *See, e.g.*, *Locke v. United States*, 7 Cranch 339, 348 (1813) ("[T]he term 'probable cause' . . . imports a seizure made under circumstances which warrant suspicion."); *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949) ("[P]robable cause . . . deal[s] . . . with factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . The rule . . . afford[s] the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("The probable-cause standard . . . deals with probabilities and depends on the totality of circumstances.").

The panel, however, found in 2009 that "[i]n evaluating the totality of circumstances in this case," it was "embark[ing] on uncharted waters" because the "circuit has never addressed" the issue of whether other evidence of fraudulent intent, above and beyond the tender of a potentially counterfeit bill, is necessary for probable cause. Pet. App. 10-11. The panel went on to cite the cases, as discussed supra, to support its conclusory finding favorable to Respondents, without ever discussing a single fact necessary to evaluate the totalities of circumstances in these cases vis-à-vis the totality of circumstances in Petitioner's case.

Moreover, in citing the cases, the panel impliedly noted that the strongest case Respondents have on their side is *Everett*. But even if *Everett*'s holding does apply in Petitioner's case, the Eleventh Circuit's language is very clear: "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note." 719 F.2d at 1120.

Reason and public policy dictate that the *Everett* language be construed narrowly because to construe otherwise would substantially expand the area in which police officers can make pretextual arrests, weaken Fourth Amendment protections, and violate the constitutional presumption of innocence. It is also not difficult to imagine that an ordinary citizen knowledgeable about this law may use this

knowledge to get a fellow citizen arrested for passing a "suspicious" bill.

Even if Petitioner believes the opinion in *Everett* is poorly written because of its unwarranted brevity, the most reasonable interpretation of its holding can only be as follows: if a police officer has a *confirmed* counterfeit note and has identified the passer of said note, then he can make an arrest; if, however, he only has a *suspected* counterfeit note, then he needs more. Thus, the panel's total failure to recognize the significant difference between "a suspect with a confirmed counterfeit note" and "a suspect with a suspected counterfeit note" is the most egregious error in its ruling.

Additionally, to construe *Everett* the way the panel did is to subvert the intent behind the statute and to water down the very concept of what "crime" is, a concept which has "deep and early root[s] in American soil." *Morissette v. U.S.*, 342 U.S. 246, 251-252 (1952). The statute's legislative intent was clear: "It is plain that Congress intended to make the intent to defraud the criminal intent. . . ." *United States v. Provenzano*, 171 F. 675, 676 (S.D.N.Y. 1909). Thus, to be a suspect of a counterfeiting crime, arresting officers must have a legitimate basis in believing that their arrestee is actuated by the criminal intent to defraud.

Many times, the Court "has held counterfeiting laws inapplicable to fraudulent transactions – even when counterfeit bills were exchanged – if the parties

believed the currency to be valid." *Barbee v. United States*, 392 F.2d 532, 536 (5th Cir. 1968), cert. denied, 391 U.S. 935 (1968) (citing *United States v. Carll*, 105 U.S. 611 (1882); *Dunbar v. United States*, 156 U.S. 185 (1895); and *Prussian v. United States*, 282 U.S. 675 (1931)). Moreover, various circuits have ruled that even "[t]he mere passing of [confirmed] counterfeit bills is not sufficient to show knowledge on the part of the [person who passed the bills] that they were counterfeit." *United States v. Litberg*, 175 F.2d 20, 23 (7th Cir. 1949) (citing *United States v. Ruffino*, 67 F.2d 440, 441 (2nd Cir. 1933); *see also United States v. King*, 326 F.2d 415 (6th Cir. 1964), cert. denied, 377 U.S. 957 (1964). It is thus manifestly obvious that no reasonable police officer can find fraudulent intent solely on the basis of the mere passing of a *suspected* counterfeit bill. After all, in the conduct of one's daily commercial affairs, one exchanges bills, possibly multiple times, whether with friends, family members, vendors, banks or machines like ATMs and slot machines. Therefore, because of the size, fungible nature, and other inherent characteristics of currency, other facts have to be shown – and they can only be shown if a reasonably competent pre-arrest investigation has been made.

The totality of circumstances rule provides a logical and constitutionally sound basis for enforcing and effecting arrests under the statute. The rule should not be diminished. Granting an officer qualified immunity for similar conduct exhibited by

Respondents here minimizes that officer's duty to properly investigate a potential crime, allows him to escape with impunity his abuses of discretion, and converts what is a qualified immunity into an absolute one.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), the Court held that "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." Thus, especially where there is a dearth of evidence of specific intent to defraud, officers should not be allowed to disregard circumstances which negate the possibility of any crime being committed, and, in the process, dispense with logic and reason. To rule otherwise "would render any individual vulnerable to arrest who unknowingly, through the normal stream of commerce, comes to possess or use a counterfeit bill, even if other circumstances suggest that a crime has not been committed. *This is not and cannot be the law*." Pet. App. 43 (italics added).

On this qualified immunity case, the panel has ruled in 2007 that Petitioner has alleged a constitutional violation, Pet. App. 37, even where it did not find the need to revisit this ruling again in 2009. Moreover, as discussed supra, in both its 2007 and 2009 opinions, the panel has ruled that it was clearly established that probable cause of Petitioner's specific intent to defraud is required. Thus, regardless of whether *Saucier*'s two-step analytical sequence is reversed or not, the result should have been the

same: Respondents have to stand trial and be held accountable for the violations they visited upon Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

LAWRENCE W. FASANO, JR.
Counsel for Petitioner

August 2009

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODEL E. RODIS,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipality,

Defendant-Appellant,

LIDDICOET, San Francisco Police Officer; BARRY, San Francisco Police Sergeant; ALEX FAGAN, San Francisco Police Chief,

Defendants-Appellants,

and

SAN FRANCISCO POLICE DEPARTMENT,

Defendant.

No. 05-15522

D.C. No. CV-04-00314-MMC

OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

On Remand From The United States Supreme Court*

Filed March 9, 2009

* This case is hereby resubmitted.

Before: Dorothy W. Nelson and Consuelo M. Callahan, Circuit Judges, and Cormac J. Carney,** District Judge.

Opinion by Judge D.W. Nelson

COUNSEL

Scott D. Wiener, San Francisco, California, for the defendants-appellants.

Lawrence W. Fasano, Jr., San Francisco, California, for the plaintiff-appellee.

OPINION

D.W. NELSON, Senior Circuit Judge:

Rodel E. Rodis brought suit under 42 U.S.C. § 1983 against, *inter alia,* two San Francisco police officers, alleging a violation of his Fourth Amendment rights during a February 2003 arrest. The district court rejected the assertion of qualified immunity by the police officers. Defendants filed an interlocutory appeal, and, in 2007, we affirmed. The Supreme Court granted Defendants' petition for a writ of certiorari, vacated our decision, and remanded for further consideration, in light of *Pearson v. Callahan,* 555 U.S. ___, No. 07-751, slip op. 1 (Jan 21, 2009). We now reverse.

** The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

FACTUAL AND PROCEDURAL BACKGROUND

On February 17, 2003, Rodel E. Rodis, an attorney and a locally elected public official, entered a drugstore near his office to purchase a few items. He tendered a 1985 series $100 bill, which lacked the security thread, watermarks, microprinting, and other anti-counterfeiting features of current $100 bills.

The cashier examined the bill for authenticity, and asked the store manager, Dennis Snopikov, for assistance. Because he suspected that the bill was counterfeit, Snopikov took it to the store office to compare it to other $100 bills in the store's safe. While Snopikov was in the office, Rodis pulled another $100 bill from his wallet and paid the cashier. After determining that the second bill was authentic, the cashier gave Rodis his change, his receipt, and the purchased items. Snopikov returned to the front of the store, and tested the bill with a counterfeit detector pen, which indicated that it was authentic. He remained suspicious, however, because of the bill's appearance and texture, and told Rodis that he was going to call the police so that they could settle the issue. Rodis was frustrated with the delay, but remained in the store willingly until the officers arrived.

Sergeant Jeff Barry, Officer Michelle Liddicoet, and two other police officers arrived on the scene. Snopikov conveyed his suspicions, and some of the officers examined the bill themselves. The officers

tried the counterfeit detector pen on a folder – the marking, however, indicated that the folder was also genuine United States currency. The officers concluded that the bill was probably counterfeit, but, because they were uncertain, decided it would be necessary to call the United States Secret Service to get an expert opinion. Because they believed it would be easiest to continue the investigation from the police station, they arrested Rodis on suspicion of violation 18 U.S.C. § 472, which criminalizes the possession and use of counterfeit currency. No effort was made to investigate Rodis's state of mind.

Liddicoet and another officer handcuffed Rodis and transported him to the police station. Rodis was restrained while the officers called the Secret Service hotline and left a message. After approximately thirty minutes, a Secret Service agent returned the call. The police and the agent discussed the details of the bill in question for five to ten minutes, during which the agent confirmed that the bill was, in fact, genuine. The officers released Rodis from custody, removed his handcuffs, and drove him back to the drugstore. The entire incident lasted about one hour.

On October 1, 2003, Rodis filed suit against the City and County of San Francisco, the San Francisco Police Department, the police chief, and Sergeant Barry and Officer Liddicoet. The complaint alleged false arrest and use of excessive force in violation of Rodis's Fourth Amendment rights, conspiracy to violate Rodis's rights, as well as several state law

claims, including false arrest and intentional and negligent infliction of emotional distress.

On February 11, 2005, the defendants moved for summary judgment. The District Court granted the motion as to Rodis's conspiracy, municipal liability, and injunctive relief claims, and denied the motion in all other respects. The court held that because Barry and Liddicoet ("Defendants") lacked evidence of Rodis's intent to defraud, there was no probable cause and the arrest was unlawful. It also found that the illegality of the arrest was clearly established at the time.

Defendants filed an interlocutory appeal to this court, and we affirmed the District Court's order. Defendants subsequently petitioned for a writ of certiorari. The Supreme Court granted the petition, vacated our decision, and remanded for further consideration in light of *Pearson v. Callahan*, 555 U.S. ___, No. 07-751, slip op. 1 (Jan. 21, 2009).

JURISDICTION

"As a general rule, interlocutory appeals from determinations of qualified immunity are permissible." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1059 (9th Cir. 2006). "[T]he denial of a defendant's motion for summary judgment is immediately appealable where the defendant is a public official asserting the defense of qualified immunity, and the issue appealed concerns whether the facts demonstrated a violation of clearly established law." *Id.*

(citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). We therefore have jurisdiction over this case.

STANDARD OF REVIEW

"We review de novo a district court's decision denying summary judgment on the ground of qualified immunity." *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945 (9th Cir. 2003). "On appeal, the court of appeals . . . must resolve any factual disputes in favor of the plaintiff and decide the legal question as to whether the official's alleged conduct violated clearly established law." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 807 (9th Cir. 2003).

DISCUSSION

A.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. ___, No. 07-751, slip op. 1, 5-6 (Jan. 21, 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* at 6. "The entitlement is an *immunity from suit* rather than a

mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell,* 472 U.S. at 526.

In *Saucier v. Katz,* 533 U.S. 194, 200 (2001), the Supreme Court mandated a two step sequence for resolving qualified immunity claims. First, a court must decide whether the alleged facts make out a violation of a constitutional right. *Id.* at 201. If the plaintiff satisfies the first step, the court must then decide whether the right at issue was "clearly established" at the time of the alleged misconduct. *Id.* More recently, however, the Supreme Court revisited *Saucier* and concluded that "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Pearson,* slip op. at 10. "The judges of . . . the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* Accordingly, we first turn to the question of whether the right asserted in this case was "clearly established."

B.

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action. *Harlow,* 457 U.S. at 819. The constitutional violation

must be "clearly established" at the time of the alleged misconduct. *CarePartners, LLC v. Lashway,* 545 F.3d 867, 882 (9th Cir. 2008).

"The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "[T]he injured party need not establish that the Defendants behavior had been previously declared unconstitutional." *CarePartners,* 545 F.3d at 882 (internal quotation marks omitted). "The dispositive inquiry is 'whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted.'" *Id.* at 883 (quoting *Saucier,* 533 U.S. at 202).

The Defendants concluded that they had probable cause to arrest Rodis on suspicion of possession and/or use of counterfeit currency. "To support a conviction for possession of counterfeit currency with intent to defraud under 18 U.S.C. § 472, the government must prove three elements: (1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) possession with intent to defraud." *United States v. Rodriguez,* 761 F.2d 1339, 1340 (9th Cir. 1985); *see*

also Albillo-Figueroa v. INS, 221 F.3d 1070, 1073 (9th Cir. 2000) (reciting the same elements); *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979) (per curiam) (same).

"Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Indeed, "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

Although "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972), we have held that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred," *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994); *see also Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1499 (9th Cir. 1996) (holding that officers must

have probable cause of a motorcyclist's actual knowledge that a certified helmet does not comply with helmet safety laws before ticketing).

Possession of counterfeit currency is a specific intent crime. *United States v. Dearing,* 504 F.3d 897, 902 (9th Cir. 2007) (upholding a jury instruction defining "intent to defraud" as "the specific intent to deceive or cheat"); *United States v. Cloud,* 872 F.2d 846, 852 n.6 (9th Cir. 1989) (defining "intent to defraud" as "to act wilfully, and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself"); *United States v. DeFilippis,* 637 F.2d 1370, 1373 (9th Cir. 1981) ("The key element of section 472 is its mens rea, the specific intent to defraud."). Thus, it was clearly established that the Defendants were required to have probable cause of Rodis's specific intent to defraud the store for a lawful arrest.

In evaluating the totality of the circumstances in this case, however, we embark on unchartered waters. Defendants assert that they had probable cause as to Rodis's intent based solely on the evidence suggesting that the bill might have been fake. Rodis contends that without specific evidence of his intent to defraud, above and beyond the tender of a potentially counterfeit bill, the arrest was unlawful.

This circuit has never addressed this issue.[1] All of the other circuits to have answered this question, however, have found that "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note." *United States v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983) (per curiam) (collecting cases); *see, e.g., United States v. Armstrong*, 16 F.3d 289, 294 (8th Cir. 1994); *United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987); *United States v. Allison*, 616 F.2d 779, 782 (5th Cir. 1980); *United States v. Trotter*, 433 F.2d 113, 115 (7th Cir. 1970); *United States v. Smith*, 357 F.2d 318, 320 (6th Cir. 1966) (per curiam); *cf. United States v. Ayers*, 426 F.2d 524, 529 (2d Cir. 1970). In *Pearson*, the Supreme Court noted that "where the divergence of views on . . . [the

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[1] Defendants point to *United States v. Bates*, 352 F.2d 399 (9th Cir. 1965) (per curiam), and *United States v. Ford*, 461 F.2d 534 (9th Cir. 1972) (per curiam), in which we upheld the probable cause determinations for arrests on suspicion of possession of counterfeit currency. The factual descriptions in both opinions, however, are meager, and it is impossible to determine what facts were deemed sufficient for probable cause. *See Ford*, 461 F.2d at 534; *Bates*, 352 F.2d at 400 (describing "the tow truck operator . . . who filled in chinks of circumstance to give probable cause"); *see also United States v. Blum*, 432 F.2d 250, 252 (9th Cir. 1970) (upholding probable cause but not describing the circumstances surrounding the passing of the counterfeit bills). Most importantly, all three of these cases predate *Gasho*, 39 F.3d at 1428, which was the first case to address the interplay between specific intent and probable cause.

constitutionality of the alleged misconduct] [i]s created by the decision of the Court of Appeals in th[e] case, it is improper to subject petitioners to money damages for their conduct." Slip op. at 20. Thus, regardless of whether we determine that evidence beyond the tender of a counterfeit bill was required, Defendants are entitled to qualified immunity. Were we to decide that there was a violation, we would create a circuit split and Defendants would not have been on notice that their conduct was unlawful. Were we to decide that this evidence was not required, Rodis's claim would fail in the first instance. Because it is unnecessary to disposition of this case, we decline to decide this question.

Assuming that tender of a counterfeit bill was enough to establish probable cause, we must decide whether the officers' belief that the bill was fake was reasonable. The Supreme Court has "recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Anderson*, 483 U.S. at 641; *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991). "[I]n such cases those officials . . . should not be held personally liable." *Anderson*, 483 U.S. at 641. "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229 (internal quotation marks omitted). It is undisputed that Rodis's $100 bill looked odd, and that it lacked many modern security

features. Although the arrest was unfortunate, we cannot say that the officers belief that it was fake was plainly incompetent. The arrest, therefore, was not clearly established as unlawful.

CONCLUSION

For the foregoing reasons, we conclude that Defendants were entitled to qualified immunity. We reverse the District Court's order, and remand for entry of judgment.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RODEL E. RODIS,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants /

No. 04-0314 MMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; VACATING HEARING

(Docket No. 38)

Before the Court is the motion of defendants City and County of San Francisco ("the City"), former San Francisco Police Chief Alex Fagan ("Fagan"), San Francisco Police Officer Michelle Liddicoet ("Liddicoet"), and San Francisco Police Sergeant Jeff Barry ("Barry") for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Rodel Rodis ("Rodis") has filed opposition, to which defendants have replied. Having considered the papers filed in support of and in opposition to the motion, the Court deems the matter appropriate for decision on the papers, VACATES the hearing scheduled for March 18, 2005, and rules as follows.

BACKGROUND

Rodis is an "elected official of [the] San Francisco Community College Board, a lawyer in private practice, and an active member of the Filipino American community." (*See* Compl. ¶ 2.) Rodis alleges that on

February 17, 2003, he was "without probable cause, detained, handcuffed, and transported to the police station on the pretext he was suspected of using a counterfeit one hundred dollar bill to purchase goods from a Walgreens " (*See* Compl. ¶ 16.) Based on these allegations, Rodis alleges six causes of action, specifically, a claim under 42 U.S.C. § 1983 (First Cause of Action,), a claim of conspiracy to deprive him of his civil rights (Second Cause of Action), a claim for a mandatory injunction (Third Cause of Action), a claim of false arrest (Fourth Cause of Action), a claim of negligent infliction of emotional distress (Fifth Cause of Action), and a claim of intentional infliction of emotional distress (Sixth Cause of Action).

DISCUSSION

Rodis's claims are based on two theories. First, Rodis alleges he was subjected to an unreasonable seizure when he was placed in handcuffs, arrested without probable cause, and then detained at a police station until such time as the officers learned, from contacting the Secret Service, that the bill he attempted to use at Walgreens' was not counterfeit. Second, Rodis alleges defendants' actions were taken on account of racial animus.

I. Damages Claims Against Liddicoet and Barry

A. Federal Claims

Defendants argue that Liddicoet, one of the arresting officers, and Barry, the ranking officer at the scene of the arrest, are entitled to summary judgment because they did not violate any of Rodis's rights or, alternatively, if they did, they are entitled to qualified immunity.[1]

1. Reasonableness of Seizure

Defendants argue that, based on statements made to the officers by Walgreens employees that they suspected the bill presented by Rodis might be counterfeit,[2] and the observations of officers at the

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[1] Although Liddicoet and Barry played different roles in the arrest, defendants do not differentiate between the actions of these two defendants.

[2] At Liddicoet's deposition, she answered "yes," in response to the question, "Were you informed that Walgreens suspected the bill was counterfeit?" (*See* Wiener Decl. Ex. C at 42.) Denis Snopikov, Walgreens' assistant manager, testified he informed the officers he had used a "counterfeit pen" on Rodis's bill and that Rodis's bill "passe[d] the test," but he was "confused" and "suspected" the bill to be counterfeit because he had also compared Rodis's bill to a "newer version of the $100 bill" and saw that Rodis's bill did not have the same "watermarks or protective thing" as the newer bill. (*See id.* Ex. A at 46-47.)

scene,[3] defendants had probable cause to arrest Rodis for violation of 18 U.S.G. § 472.[4]

Section 472 provides that "[w]hoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeit, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both." *See* 18 U.S.C. § 472. Defendants argue they had probable cause to believe Rodis violated § 472 because it is undisputed they had probable cause to believe "Rodis had attempted to pass a bill that appeared to be fake." (*See* Defs.' Mot. for Summ. J. at 12:4.)[5] Defendants, however, do not argue, at least for the purposes of the instant motion, they had probable cause to

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[3] At Liddicoet's deposition, she answered "yes," in response to the question, "Did it [the bill] look real to you?" (*See* Wiener Decl. Ex. H at 63.) Barry testified that, although he did not handle the bill and was somewhere between 10 and 50 feet away from the officers handling the bill, he formed the "impression that it seemed bogus" because the bill "seemed very light and like maybe not like the paper they use for currency." (*See, id.* Ex. E at 54, 57.) Another officer at the scene, Barbara Dullea "Officer Dullea"), testified that the "bill's color and texture appeared odd." (*See* Dullea Decl. ¶ 3.)

[4] Defendants do not argue the seizure in question constituted an investigatory stop.

[5] In light of the Court's holding, discussed *infra*, the Court does not address the issue of whether the officers had probable cause to believe the bill was counterfeit.

believe plaintiff had an intent to defraud. Defendants acknowledge that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred," *see Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F. 3d 1486, 1499 (9th Cir. 1996), but argue that specific intent is not a required element of § 472. Defendants further argue that, in the event this Court finds that specific intent is a required element, such a finding would constitute "new law" rather than "clearly established law," thus entitling Liddicoet and Barry to qualified immunity. *See, e.g., Robinson v. Solano County*, 278 F. 3d 1007, 1015 (9th Cir. 2002) (holding defendants, who violated Fourth Amendment by "pointing a gun to the head of an apparently unarmed suspect," were entitled to qualified immunity because "contours of that right were not at all clear in [the year of the incident]").

The Ninth Circuit has held, in an opinion issued almost twenty years before Rodis's arrest, that "[t]he key element of section 472 is its mens rea, the specific intent to defraud." *See United States v. DeFilippis*, 637 F. 2d 1370, 1373 (9th Cir. 1981) (affirming conviction for violation of § 472 where evidence supported jury's finding defendant passed bill she knew to be counterfeit "with an intent to deceive").

Defendants, nevertheless, rely on cases that, in defendants' view, hold that probable cause to arrest for a violation of § 472 exists even though the officers only have probable cause to believe the suspect has

used a counterfeit bill. The Court initially notes that none of the gases cited by defendants includes a specific holding to such effect. Moreover, the cases cannot be read to support defendants' position. In some instances, the nature of the facts found sufficient to support probable cause are unknown. *See, e.g., Bates v. United States,* 352 F. 2d 399, 400 (9th Cir. 1965) (referring to "tow truck operator at the scene who filled in chunks of circumstance to give probable cause," but not selling forth such circumstance). Others refer to information known to the arresting officer that supports a finding of probable cause as to the element of specific intent to defraud. *See, e.g., United States v. Covelli,* 738 F. 2d 847, 853-54 (7th Cir. 1984) (stating officer, having been advised by store clerk that defendant had passed bill that looked counterfeit, "asked to talk to [the defendant] about something," and that defendant "immediately responded, 'What's wrong? Was the money bad?,' even though the officer had not mentioned money"); *see also United States v. McCall,* 924 F. 2d 1066, 1068 (9th Cir. 1979) (holding jury's finding as to § 472's "intent to defraud" element supported by evidence of defendant's statements exhibiting "consciousness of guilt").[6]

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[6] The sole case arguably supporting defendants' position is *Holt v. United States,* 404 F. 2d 914 (10th Cir. 1968). In *Holt*, the Tenth Circuit stated that because "the mere possession" of counterfeit money is a felony, "if the arresting agent had probable cause to believe such felony was being perpetrated, the arrest was proper." *See id.* at 917-18. The Tenth Circuit, however, cited

(Continued on following page)

Additionally, defendants cite several cases for the proposition that specific intent is not a required element of § 472. *See, e.g., United States v. Pitts,* 508 F. 2d 1237, 1240 (8th Cir. 1975) (holding, to establish violation of § 472, prosecution must prove defendant possessed counterfeit bills, that defendant knew bills were counterfeit, and that defendant "had a general intent to defraud unknown persons with those bills"). The precise holding of such cases, however, is that it is unnecessary to prove that the defendant intended to defraud a specific person, not that no intent to defraud need be proved. *See Riggs v. United States,* 280 F. 2d 750, 752 (5th Cir. 1960) (discussing indictment in which "'intent to defraud' under Section 472 is charged generally"; holding "'intent to defraud' required by 18 U.S.C. § 472 when, as here, such intent is not restricted by the terms of the indictment or by a bill of particulars to any specified person, may be an 'intent to defraud' unknown third persons").

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no authority providing that "mere possession" is unlawful. Further, the opinion refers to evidence known to the arresting officers that would appear to support a finding of probable cause as to specific intent. *See id.* at 916 (stating agents, who had been advised by "reliable" informant that defendant had agreed to sell informant "counterfeit money," found defendant with counterfeit money at place described by informant). In any event, the opinion, if interpreted as holding a person may be convicted of "mere possession" of a counterfeit bill, is contrary to Ninth Circuit authority holding that "[t]he mere passing of a counterfeit bill is not a criminal offense." *See United States v. Lorenzo,* 570 F. 2d 294, 299 (9th Cir. 1978).

In short, specific intent to defraud is a required element of § 472, and the law was clearly established in the Ninth Circuit well before February 2003. Consequently, it was clearly established before February 2003 that defendants, in order to validly arrest Rodis for violation of § 472, were required to have probable cause to believe Rodis had an intent to defraud. Because defendants do not argue that, in arresting Rodis, they had probable cause to believe Rodis had the specific intent to defraud, defendants have failed to show that the seizure was reasonable. Consequently, defendants have failed to demonstrate that no triable issue of fact exists as to the reasonableness of the seizure.[7]

Similarly, defendants have failed to demonstrate Liddicoet and Barry are entitled to qualified immunity. As noted, at the time of the events in question, the law requiring probable cause as to specific intent was well-established, as was the law making specific intent to defraud an element of § 472. *See Easyriders Freedom F.I.G.H.T.*, 92 F. 3d at 1499; *DeFilippis*, 637 F. 2d at 1373. Consequently, defendants' argument that to require probable cause as to the specific intent

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[7] Because defendants have failed to establish, for purposes of summary judgment, that they had probable cause to arrest Rodis, defendants' argument that it was reasonable to place Rodis in handcuffs, to transport him to a police station, and to restrain him at the station in handcuffs likewise fails. *Cf. Frazier v. City of Philadelphia*, 927 F. Supp. 2d 881, 886-87 (E.D. Pa. 1996) ("Certainly arrest is one of the circumstances justifying the use of handcuffs.").

to defraud would be to create "new law," (*see* Defs.' Mot. for Summ. J. at 15:1, 6), is of no avail.

Accordingly, defendants have not shown Liddicoet and Barry are entitled to summary judgment on Rodis's federal claims for damages to the extent such claims are predicated on the unreasonableness of the seizure.

2. Equal Protection Claim

As noted, Rodis alleges he was subjected to an unreasonable seizure on account of his race. To establish an equal protection deprivation claim, a plaintiff must offer evidence that the defendant "acted in a discriminatory manner and that the discrimination was intentional." *See Bingham v. City of Manhattan Beach*, 341 F. 3d 939, 948 (9th Cir. 2003) (internal quotation and citation omitted).

Rodis argues that because defendants have not proffered a "reasonable explanation" for their decision to "place a publicly elected Filipino city official under arrest," a trier of fact could conclude that defendants took such action on account of Rodis's race. (*See* Pl.'s Opp. at 8:20-9:4.) In essence, plaintiff argues that evidence of his unreasonable seizure coupled with evidence that he is Filipino suffices to establish a prima facie case of racial discrimination. However, as the Ninth Circuit explained in *Bingham*, a case involving an African-American driver stopped by a white officer, evidence that "[the plaintiff] is African-American, the officer is white, and they disagree

about the reasonableness of the traffic stop" is insufficient to support an equal protection claim. *See Bingham,* 341 F. 3d at 948-49.[8]

Moreover, to the extent evidence of animus has been introduced, such evidence does not support a finding of animus on the basis of race. Rather, the evidence, arguably, supports a finding that Barry held negative feelings about Rodis based on reasons having nothing to do with race. Specifically, the evidence, construed in the light most favorable to Rodis, is that, several years prior to the arrest at issue, Barry had a conversation with Rodis during which Barry expressed his disagreement with the Community College Board's policy prohibiting its police officers from carrying firearms and his opinion that Rodis's family was not sufficiently supportive of the athletic department at their children's school.[9] (*See* Weiner Dec. Ex. E at 35-40; Fasano Decl. Ex. 1 at 26-28.)

Accordingly, defendants have shown that Liddicoet and Barry are entitled to summary judgment on Rodis's federal claims to the extent such claims are predicated on a deprivation of equal protection.

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[8] Rodis does not offer evidence as to the race of Liddicoet or Barry.

[9] Barry testified that he was the "athletic director" for the school. (*See* Wiener Decl. Ex. E at 36.)

B. State Law Claims

Rodis's state law claims, as pleaded, are derivative of his federal law claims. (*See* Compl. ¶¶ 30-31, 35-36, 39-40.) Defendants argue that Liddicoet and Barry are entitled to summary judgment on such claims, on the ground Rodis cannot demonstrate he was subjected to an unreasonable seizure and was arrested on account of his race.

For the reasons stated above, defendants have failed to show that Liddicoet and Barry are entitled to summary judgment on the state law claims, to the extent such claims are predicated on the unreasonableness of the seizure, and are entitled to summary judgment on the state law claims, to the extent such claims are predicated on a deprivation of equal protection.

II. Damages Claims Against the City and Fagan

A. Federal Claims

Rodis alleges that the City and Fagan, in his official capacity, are liable under 42 U.S.C. § 1983 for the deprivation of Rodis's federal rights, on the ground such deprivation occurred pursuant to an official City policy or custom, specifically, a lack of training.

A local government entity can be held liable under 42 U.S.C. § 1983 for actions that result in the deprivation of a plaintiffs federal constitutional

rights. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). The government entity, however, cannot be held liable under § 1983 on a respondeat superior theory. *See id.* at 691. Rather, the plaintiff must show that the employee's unconstitutional activity was "undertaken pursuant to official policy or custom." *See Hopper v. City of Pasco*, 241 F. 3d 1067, 1082 (9th Cir.) (citing *Monell*, 435 U.S. at 690-91), *cert. denied*, 122 S. Ct. 346 (2001).

A municipality's failure to train police officers can constitute a "policy" for *Monell* purposes where "the failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." *See City of Canton v. Harris*, 489 U.S. 378, 389, 390 n.10 (1989) (observing that because "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons," a city's failure to train officers on the use of deadly force in such situations "could properly be characterized as 'deliberate indifference' to constitutional rights"). Where, however, a plaintiff bases a *Monell* claim on the theory that the training provided on a specific subject is insufficient, as opposed to totally lacking, the plaintiff cannot prevail unless the plaintiff offers evidence that the insufficiency was the "result of a 'deliberate' or 'conscious' choice" by the municipality. *See Alexander v. City and County of San Francisco*, 29 F. 3d 1355, 1367 (9th Cir. 1994) (quoting *Canton*, 489 U.S. at 389). In other words, the plaintiff must offer evidence to show the municipality "knew it was creating an unjustifiable risk to its

citizenry and ignoring that risk." *See Mateyko v. Felix*, 924 F. 2d 824, 826 (9th Cir. 1990), *cert. denied*, 504 U.S. 814 (1991).

Here, defendants argue Rodis lacks evidence that any unreasonable seizure was taken pursuant to an official policy or custom. Specifically, defendants rely on evidence that the San Francisco Police Department ("SFPD") "periodically issues training updates" in the form of "Roll Call Training Lessons," and that the SFPD has a policy that Roll Call Training Lessons are distributed to all officers, who are then required to read them. (*See* Osborne Decl. ¶¶ 3-4.) Defendants also rely on evidence that, in May 2001, the SFPD issued a Roll Call Training Lesson ("2001 Lesson") regarding "counterfeit currency issues confronting law enforcement," and that such Lesson was distributed to all officers, who, pursuant to official policy, were required to read it. (*See id.* ¶¶ 6.) The 2001 Lesson included a "scenario" in which an officer was called to a store on a complaint of counterfeit currency; additionally, the 2001 Letter set forth a list of "critical issues" an officer might confront in such situation, identified potentially applicable state statutes, and concluded with practice exercises. (*See id.* Ex. A) Defendants further rely on evidence that Officer Dullea, who was present at Walgreens' during Rodis's arrest, recalls seeing written material at the police station stating, in Dullea's words, "what to look for regarding counterfeit currency," (*see* Dullea Decl. ¶ 5), and that Barry also recalls a "bulletin or some sort of training" on counterfeit currency being distributed

around the police station, (*see* Wiener Decl. Ex. E at 19-20).

Rodis argues the 2001 Lesson was deficient in that it did not refer to the element of specific intent to defraud, did not refer to a specific procedure to be followed in all counterfeit bill investigations, and only referred to state statutes. As defendants point out in their reply, however, the 2001 Lesson did refer to the state law requirement that a person possessing a counterfeit bill act with the "intent to utter or pass [the counterfeit bill] as real currency," and did include a list of "issues" that an investigating officer might confront, *e.g.*, that "[a]ny bill printed prior to 1965 will indicate as counterfeit" if tested using a counterfeit pen. (*See* Osborne Decl. Ex. A.) In any event, evidence that the 2001 Lesson could have been more specific or written in a more straightforward manner is insufficient to support a finding that the City or Fagan deliberately or consciously chose to distribute inadequate training material. *See Alexander,* 29 F. 3d at 1367.

Rodis also relies on Liddicoet's testimony that she did not receive training as to counterfeit currency. (*See* Wiener Decl. Ex. C at 17.) Although such evidence might support a finding that the City's policy requiring all officers to read Roll Call Training Lessons is not fool-proof and, indeed, that such policy failed as to Liddicoet, such evidence likewise does not support a finding that the City or Fagan deliberately and consciously chose not to train Liddicoet. *See Alexander,* 29 F. 3d at 1367 (holding evidence that one

officer had not been adequately trained as to proper procedure for arresting suspect at his home "can only be classified as negligence on the part of the municipal defendant").

Lastly, in light of the Court's finding that Rodis lacks sufficient evidence to raise a triable issue as to whether Liddicoet or Barry violated § 1983 by depriving Rodis of equal protection, Rodis cannot establish a § 1983 claim against the City or Fagan predicated on an equal protection violation. *See Orin v. Barclay*, 272 F. 3d 1207, 1217 (9th Cir. 2001) (holding civil rights claim against city "fails as a matter of law" if city employee did not deprive plaintiff of his civil rights), *cert. denied,* 536 U.S. 958 (2002).

Accordingly, defendants are entitled to summary judgment as to Rodis's federal damages claims against the City and Fagan.

B. State Law Claims

The Court next turns to Rodis's state law claims for damages. A municipality can be held liable under a respondeat superior theory for its employee's violation of state law. *See* Cal. Gov't Code § 815.2 (a) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.") For the reasons stated above, defendants have not shown that Rodis, as a

matter of law, was not subjected to an unreasonable seizure.

Accordingly, defendants are not entitled to summary judgment on the state law claims asserted against the City and Fagan, to the extent such claims are predicated on the unreasonableness of the seizure, and are entitled to summary judgment on the state law claims asserted against the City and Fagan, to the extent such claims are predicated on a deprivation of equal protection.

III. Claim for Injunctive Relief

Rodis alleges, in his Third Cause of Action, that he is entitled to an injunction compelling defendants "to allow [Rodis] to be free of discriminatory treatment by [d]efendants." (*See* SAC ¶ 29.)

Defendants argue that Rodis lacks standing to seek the requested injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding plaintiff who had been injured by officers' use of specific type of chokehold, lacked standing to seek injunction against future use of such chokehold because plaintiff did not establish "real and immediate threat" he would again be subjected to such chokehold). Plaintiff, in his opposition, fails to respond to this argument, and, in any event, fails to offer any evidence to establish his standing to seek the requested injunction.

Accordingly, defendants are entitled to summary judgment on the Third Cause of Action.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is hereby GRANTED in part and DENIED in part, as follows.

1. Defendants are entitled to summary judgment on the Third Cause of Action, and on all claims, to the extent they are based on an equal protection deprivation theory.

2. Defendants City and Fagan are entitled to summary judgment on Rodis's federal claims for damages.

3. In all other respects, the motion is denied.

This order terminates Docket No. 38

IT IS SO ORDERED.

Dated: March 22, 2004

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODEL E. RODIS,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipality; LIDDICOET, Officer, San Francisco Police Officer; BARRY, Sergeant, San Francisco Police Sargeant; ALEX FAGAN, San Francisco Police Chief,

Defendants-Appellants,

and

SAN FRANCISCO POLICE DEPARTMENT,

Defendant.

No. 05-15522

D.C. No. CV-04-00314-MMC

OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
April 20, 2007 – San Francisco, California

Filed August 28, 2007

Before: Dorothy W. Nelson and
Consuelo M. Callahan, Circuit Judges,
and Cormac J. Carney,* District Judge.

Opinion by Judge D.W. Nelson;
Dissent by Judge Callahan

COUNSEL

Scott D. Wiener of San Francisco, California, briefed and argued for the defendants-appellants.

Lawrence W. Fasano, Jr. of San Francisco, California, briefed and argued for the plaintiff-appellee.

OPINION

D.W. NELSON, Circuit Judge:

Rodel E. Rodis brought suit against the City and County of San Francisco, the San Francisco Police Department, the police chief, and two police officers under 42 U.S.C. § 1983 alleging a violation of his Fourth Amendment rights during a February 17, 2003 arrest. The district court dismissed the suit against the City and the police chief, but it rejected an assertion of qualified immunity by two of the officers ("Defendants"). Defendants brought an interlocutory

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* The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

appeal, and we affirm, finding the Defendants not entitled to qualified immunity.

I. FACTUAL & PROCEDURAL BACKGROUND

Rodis is an attorney and an elected public official who sits on the Community College Board of the San Francisco City College. On February 17, 2003, Rodis entered a drugstore near his office to purchase a few items. He tendered to the cashier a $100 bill, and she examined it for authenticity. Because it was an old bill (a 1985 series), and because it appeared to have a texture different than bills with which the cashier was familiar, she asked the store manager for assistance. The manager came to the counter and examined the bill. Suspecting that it might be counterfeit, the manager took the bill to an office in the back of the store to compare it to other $100 bills from the store's safe.

While the manager was examining the bill, Rodis pulled another $100 bill from his wallet and paid the cashier. After determining that the second bill was authentic, the cashier gave Rodis his change, receipt, and items. Rodis then waited for the manager to return with his bill. After comparing Rodis's bill with similar bills, the manager returned to the front of the store and tested the bill with a counterfeit detector pen, which indicated it was authentic. Nevertheless, the manager remained suspicious because of the bill's appearance and texture. The manager told Rodis he thought the bill might be fake and he was going to

call the police so that they could settle the issue. Rodis was frustrated with the delay but remained in the store willingly until the officers arrived.

Sergeant Jeff Barry and officer Barbara Dullea arrived first on the scene. Officers Michelle Liddicoet and James Nguyen arrived soon thereafter. The drugstore's employees conveyed to the officers their suspicions regarding the bill. The manager told Nguyen he had compared the bill to another and was uncertain about the bill's authenticity. The officers also examined the bill themselves. They concluded it was probably counterfeit, but because they were not certain, the officers decided it would be necessary to call the United States Secret Service to get an expert opinion. *Before doing so,* however, they arrested Rodis for violating 18 U.S.C. § 472,[1] which criminalizes the possession and/or use of counterfeit currency, because the officers believed it would be easiest to continue the investigation from the police station. Notably, no effort was made to investigate whether Rodis intended to use an ersatz bill or whether he believed the bill to be counterfeit. Furthermore, the officers

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[1] Section 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 472.

never asked to see the other $100 bill Rodis had used to complete the purchase, nor did they ask to see the bills the manager stated he had compared with the bill in question.

Liddicoet and Nguyen handcuffed and transported Rodis in the back of a squad car to the police station. Once they arrived, the officers restrained Rodis in a holding area while Nguyen called the Secret Service. Unable to speak with an agent right away, Nguyen left a message requesting assistance, and after twenty to thirty minutes, a Secret Service agent returned the call. Nguyen and the agent discussed the details of the bill in question for five to ten minutes, during which the agent confirmed that the bill was in fact *genuine*. The officers released Rodis from custody, and Nguyen drove him back to the drugstore.

On October 1, 2003, Rodis filed suit against the City and County of San Francisco, then Chief of Police Alex Fagan, Sergeant Barry, and Officer Liddicoet. The complaint alleged false arrest and excessive force in violation of Rodis's Fourth Amendment rights, conspiracy to violate Rodis's rights, injunctive relief, and several state law claims, including false arrest and intentional and negligent infliction of emotional distress.

On February 11, 2005, the defendants moved for summary judgment, and on March 22, 2005, the district court granted the motion as to Rodis's conspiracy, municipal liability, and injunctive relief

claims. The district court denied the motion in all other respects, holding that because the officers lacked evidence regarding Rodis's intent to defraud, probable cause was lacking and the arrest was unlawful. The court also found Barry and Liddicoet not entitled to qualified immunity because the illegality of the arrest was clearly established at the time.

II. DISCUSSION

A. Jurisdiction & Standard of Review

Normally, a district court's interlocutory order denying a motion for summary judgment is not immediately appealable. *Morgan v. Morgensen,* 465 F.3d 1041, 1044 (9th Cir. 2006). There is an exception, however, when a defendant's motion for summary judgment on the basis of qualified immunity is denied. *Gausvik v. Perez,* 345 F.3d 813, 816 (9th Cir. 2003); *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). Under this exception, we have jurisdiction pursuant to 28 U.S.C. § 1291, *Behrens v. Pelletier,* 516 U.S. 299, 301 (1996), and we review the qualified immunity determination de novo. *Osolinski v. Kane,* 92 F.3d 934, 936 (9th Cir. 1996).

B. Defendants are Not Entitled to Qualified Immunity

Qualified immunity serves as a defense to § 1983 claims against government officers "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). To determine whether qualified immunity applies, we engage in a two-part inquiry:

> [W]e first must ask whether a constitutional right would have been violated on the facts alleged. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. If a constitutional violation is established, we consider whether that right was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This inquiry is wholly objective. . . .

Brittain v. Hansen, 451 F.3d 982, 988 (9th Cir. 2006) (internal citations and quotation marks omitted); *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Defendants argue they are entitled to qualified immunity because (1) they did not violate Rodis's constitutional rights, and (2) even if they did not have probable cause to arrest him, at the time of the arrest the law was not clearly established such that a reasonable officer should have known the arrest violated the Fourth Amendment. However, arresting Rodis without *any* evidence he intended to use the bill to defraud the store or that he knew (or believed) the bill was fake was a violation of his Fourth Amendment rights. Further, it was clearly established at the time of the arrest that Defendants' conduct was

unlawful. Thus, both arguments Defendants put forth are without merit.

1. Defendants did *not* have probable cause to arrest Rodis.

Defendants concede they arrested Rodis without evidence he used the bill with the intention to defraud or that he believed the bill to be fake. They also concede the arrest required probable cause as it was more than merely an investigatory stop. To be entitled to qualified immunity, therefore, Defendants must show probable cause existed absent any evidence of Rodis's intent or knowledge. This they cannot do.

Defendants' argument can be summarized in the following manner. First, they cite our decision in *United States v. Thornton*, 710 F.2d 513, 515 (9th Cir. 1983), for the premise that probable cause does not require specific evidence of every element of an offense. Second, they posit that only where "specific intent" is an element of the offense, is evidence of intent required for probable cause, citing our holding in *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996). Third, Defendants contend that 18 U.S.C. § 472 is not a specific intent crime, and, therefore, evidence regarding Rodis's intent or knowledge was not required to establish probable cause.

By focusing on the distinction between specific and general intent, Defendants lose sight of the

principal inquiry: whether they had probable cause to effectuate an arrest. Probable cause cannot be determined by applying "precise definition[s]" or rigid classifications of conduct, as Defendants suggest, "because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle,* 540 U.S. 366, 371 (2003). Indeed, "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232 (1983). Thus, the specific circumstances surrounding the arrest are an indispensable part of the analysis: "[W]e examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Pringle,* 540 U.S. at 371 (quoting *Ornelas v. United States,* 517 U.S. 690, 696 (1996)).

A review of the record reveals that the circumstances surrounding Rodis's arrest fell *far short* of creating a "fair probability" he had committed *any* crime, much less the crime in question. *See United States v. Rodriquez,* 464 F.3d 1072, 1078 (9th Cir. 2006) ("Probable cause exists when there is a fair probability or substantial chance of criminal activity."). Rodis was arrested on suspicion of violating 18 U.S.C. § 472. It was clear well before Rodis's arrest that "[t]o support a conviction for possession of counterfeit currency with intent to defraud under . . . § 472, the government must prove three elements:

(1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) possession with intent to defraud." *United States v. Rodriguez*, 761 F.2d 1339, 1340 (9th Cir. 1985); *see also Albillo-Figueroa v. I.N.S.*, 221 F.3d 1070, 1073 (9th Cir. 2000) (reciting same three required elements); *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979) (per curiam) (same). Therefore, to violate § 472, the defendant must not only possess or pass counterfeit money, but he must know the money is counterfeit *and* he must intend to use the money to defraud another.

Notwithstanding the statute's three requirements, Defendants assert they had probable cause to arrest Rodis based solely on evidence suggesting the bill might have been fake. Specifically, they point to the manager's suspicion that the bill was counterfeit, the fact Rodis used the bill to pay for small items, and the officers' own "diligent" and "independent" examination of the bill. Although it is not clear whether this evidence was enough to create the fair probability the bill was fake, even if we assume it was,[2] this evidence speaks to only one of the three elements of the offense; indeed, these facts have no bearing on

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[2] Our dissenting colleague argues that probable cause existed because "officers are allowed to make reasonable mistakes" and the officers here made a mistake in assuming the bill was counterfeit. Dissent at 10686. Of course, this is irrelevant, for even if the bill was fake, at least *some* evidence of Rodis's alleged intent to defraud would have been required to establish probable cause.

the crime's two mens rea components (i.e., knowledge and intent to defraud), which are indispensable in the probable cause calculus. *See Gasho,* 39 F.3d 1420, 1429 (9th Cir. 1994) (opining, in the context of a probable cause inquiry, "[i]t is fundamental that a person is not criminally responsible unless criminal intent accompanies the wrongful act"); *Morissette v. United States,* 342 U.S. 246, 251 (1952) (noting that a crime is the "concurrence of an evil-meaning mind with an evil-doing hand").

Defendants are correct that not every element required for a conviction is necessarily required to establish probable cause. *See Thornton,* 710 F.2d at 515. However, this rule must be applied with an eye to the core probable cause requirement; namely, that "under the totality of the circumstances, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime." *Hart v. Parks,* 450 F.3d 1059, 1066-67 (9th Cir. 2006).[3] The record shows, and Defendants concede, they had no evidence whatsoever demonstrating that Rodis intended to use the bill to defraud the store, nor was there any reason to believe Rodis believed the bill was fake. Of course, the dearth of evidence regarding

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[3] The dissent protests our citation to legal authority identifying what is required for a conviction under § 472 in determining what is required to establish probable cause. Dissent at 10687-88. But surely, identifying the elements of a crime, and evaluating which, if any, are present in a given situation are necessary to determine whether there is a "fair probability" that the crime has been committed.

the mens rea elements is not surprising given that (1) the officers did not even attempt to investigate Rodis's state of mind before arresting him, and (2) the bill was in fact genuine.

What is more, several facts known to the officers at the time of the arrest significantly *decreased* the probability that Rodis violated § 472. Viz., Rodis had other $100 bills in his possession that were genuine, one of which he used to complete the transaction; the counterfeit detector pen indicated the bill was genuine; and the officers knew Rodis was both a San Francisco attorney and a locally-elected public official with strong ties to the community in which the store was located. Specifically, Barry had known Rodis for several years. He knew Rodis was a member of the Community College Board, and he had interacted with Rodis personally, encountering him at activities associated with the elementary school that both Barry's and Rodis's children attended. Also, Rodis informed Liddicoet prior to his arrest that he was a public figure, and that he lived and worked within two blocks of the store. Liddicoet told him she knew who he was and that he "should be ashamed" of himself.

Thus, the officers' knowledge regarding Rodis's identity and background discounted any probability that Rodis might have intentionally passed a fake bill. Defendants argue that this information is irrelevant because police officers do not provide favored treatment based on a person's identity. Rodis was not entitled to special treatment, however, nor did he

request it. Instead, Rodis's strong ties to the local community should have been incorporated into the probable cause determination because *all* the facts known to the officers were relevant. *See United States v. Lopez,* 482 F.3d 1067, 1072 (9th Cir. 2007) (reiterating that probable cause requires analysis of "the totality of the circumstances").

In any event, even without knowledge of Rodis's identity and local ties, based on the totality of the other relevant facts, no reasonable or prudent officer could have concluded that Rodis intentionally and knowingly used a counterfeit bill, especially when "[t]he key element of section 472 is its mens rea, the specific intent to defraud." *United States v. DeFilippis,* 637 F.2d 1370, 1373 (9th Cir. 1981). Without at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking. To hold otherwise would render any individual vulnerable to arrest who unknowingly, through the normal stream of commerce, comes to possess or use a counterfeit bill, even if other circumstances suggest that a crime has not been committed. This is not and cannot be the law. *See United States v. Lorenzo,* 570 F.2d 294, 299 (9th Cir. 1978) ("The mere passing of a counterfeit bill is not a criminal offense. . . .").[4]

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[4] Defendants' reliance on *Easyriders* is also misplaced. In that case, we opined, "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has

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2. At the time of Rodis's arrest, it was clearly established that evidence of intent was required to establish probable cause.

Defendants contend that, even if they did not have probable cause to arrest Rodis for the offense,

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occurred." 92 F.3d at 1499 (quoting *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994)). Erroneously, Defendants cite *Easyriders* for the proposition that *only* where an offense is a specific intent crime is evidence of intent required to establish probable cause. Thus, Defendants blatantly misconstrue our holding by confusing a sufficient condition (i.e., *if the underlying offense is a specific intent crime*, evidence of intent must be present prior to an arrest) with a necessary one (i.e., if evidence of intent is required prior to an arrest, *the underlying offense must be a specific intent crime*). Furthermore, Defendants' interpretation runs contrary to the fact-specific nature of a probable cause inquiry. Probable cause does not always require a showing of every element of the crime because it "is a fluid concept – turning on the assessment of probabilities in particular factual contexts. . . ." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Consequently, it is patently unreasonable to say that evidence of a defendant's intent or knowledge is *never* required to establish probable cause for a general intent crime, as Defendants would have us hold.

In any event, Defendants are also incorrect that passing counterfeit currency is a general intent crime. Generally, "[t]o act with the 'intent to defraud' means to act willfully, and with the *specific intent* to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself." *United States v. Cloud*, 872 F.2d 846, 852 n.6 (9th Cir. 1989) (emphasis added). Section 472 expressly requires an "intent to defraud." 18 U.S.C. § 472. Thus, under *Easyriders*, proof of Rodis's specific intent to deceive or cheat was required to arrest him. *See also DeFilippis*, 637 F.2d at 1373 (stating that § 472 requires the specific intent to defraud).

the law was not clearly established at the time such that a reasonable officer would have known the arrest was unlawful. They are incorrect.

Requiring the law to be clearly established "is not to say that an official action is protected by qualified immunity unless the *very action in question* has previously been held unlawful, but it is to say that in light of pre-existing law the July 5, 2007 unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (citation omitted) (emphasis added). This means that the right may be clearly established even when "[t]he reasoning, though not the holding" of a prior court of appeals decision puts the officer on notice. *Hope v. Pelzer,* 536 U.S. 730, 743 (2002). Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances" and the facts need not be "materially similar" to the plaintiff's situation. *Id.* at 741. If the law were otherwise, "officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford,* 272 F.3d 1272, 1286 (9th Cir. 2001).

As heretofore explained, it was well established at the time of Rodis's arrest that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates,* 462 U.S. at 232. Based on the totality of the circumstances, no prudent officer reasonably could

have concluded there was a fair probability that Rodis violated § 472 or any other offense. "Mere suspicion, common rumor, or even strong reason to suspect are not enough" to establish probable cause, *Easyriders,* 92 F.3d at 1498, and the evidence in this case fell short of creating even a strong reason to suspect. Therefore, the officers were on notice that something more was required.

The only Ninth Circuit authority to which Defendants' point for support is *United States v. Bates* 352 F.2d 399 (9th Cir. 1965) (per curiam), and *United States v. Ford,* 461 F.2d 534 (9th Cir. 1972) (per curiam).[5] These cases do not stand for the proposition Defendants claim – that probable cause to arrest for a violation of § 472 can exist with nothing more than a reason to believe the bill might be fake. In fact, the

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[5] Our dissenting colleague cites three out-of-circuit cases and *United States v. Blum,* 432 F.2d 250 (9th Cir. 1970), contending that evidence of intent is unnecessary to establish probable cause. Dissent at 10688-89. Her contention, however, lacks merit. First, the out-of-circuit cases, even if applicable to the circumstances in this case, are not binding on this panel. Second, *Blum* is easily distinguishable, in that numerous facts – such as the suspect fleeing the scene and the fact the suspect lived outside the state – could have been enough to create a "fair probability" he passed counterfeit bills. In any event, *Blum* is an old case, and since it was decided (nearly forty years ago), we have made clear that (1) "[t]he key element of section 472 is . . . the specific intent to defraud," *DeFilippis,* 637 F.2d at 1373, and (2) "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Easyriders,* 92 F.3d at 1499.

opinion in *Ford,* which consists of only two paragraphs, is so lacking in factual background, that what the panel deemed sufficient for probable cause is unknown. The opinion in *Bates* also fails to provide a factual context sufficient to give the decision meaning. The opinion acknowledges that a third party, a tow truck operator at the scene of the arrest, "filled in chinks of circumstances to give probable cause," and that "the circumstances pointing to Bates as a participant in counterfeit transactions . . . certainly pointed an accusing finger at him – enough for probable cause." 352 F.2d at 400. However, there is no explanation of what any of those circumstances were.

Thus, in both *Ford* and *Bates* we are left to our own devices to determine what the relevant facts could have been in establishing probable cause. Consequently, neither case supports a finding of probable cause in the instant case.

III. CONCLUSION

Probable cause requires "information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." *Allen v. City of Portland,* 73 F.3d 232, 237 (9th Cir. 1996). Given all of the circumstances surrounding Rodis's arrest, no prudent person could have concluded reasonably that there was a fair probability Rodis had committed a crime. Consequently, Defendants are not entitled to qualified immunity.

AFFIRMED.

CALLAHAN, Circuit Judge, dissenting:

I respectfully dissent.

What happened to Mr. Rodis was unfortunate, and certainly could have been handled in a different manner. Arresting him due to a failure to recognize a older series 100 dollar bill, however, was not an intentional violation of Mr. Rodis's constitutional rights, nor was the law that probable cause for arresting someone on suspicion of violating 18 U.S.C. § 472 requires proof of the suspect's subjective intent clearly established. Therefore, the officers are entitled to qualified immunity. In fact, prior case law established that in order to have probable cause to arrest someone for a suspected violation of 18 U.S.C. § 472, an officer simply had to have evidence that 1) someone attempted to pass a false note, and 2) the identity of the person suspected of passing the note. *See United States v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983) (collecting cases).

I. The officers did not violate Mr. Rodis's constitutional rights.

Our analysis should begin with the basic principles of qualified immunity. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell*, 472 U.S. 511, 526 (1985)). "The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is

erroneously permitted to go to trial.'" *Id.* at 200-01 (quoting *Mitchell v. Forsyth*, 472 U.S. at 526). "[I]t is fundamental that in a defense of qualified immunity in order to have the public official relieved from time-consuming pre-trial procedures and trial itself, it is important to resolve this issue at an early stage of the litigation." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 808 (9th Cir. 2003).

"A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. The reason for this initial inquiry is to state principles that "will become the basis for holding that a right is clearly established" to advance the interpretation of the law. *Id.* "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."[1] *Id.*

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[1] The majority's opinion appears to begin its analysis by deciding that the right to avoid arrest if there is no evidence of specific intent is clearly established without first finding a constitutional violation. (Maj. Op. at 10678.) The Supreme Court specifically rejected this approach in *Saucier v. Katz*, 533 U.S. at 200.

A. Officers are allowed to make reasonable mistakes of fact without violating constitutional rights.

Mr. Rodis contends that the officers violated his Fourth Amendment rights by arresting him without probable cause to believe that he possessed the intent to defraud, one of the elements of a violation of 18 U.S.C. § 472. "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution." *Saucier*, 533 U.S. at 205. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

In this case, the officers made a simple mistake – they mistook a genuine 1985 series 100 dollar bill for a fake because the clerk who received the bill from Mr. Rodis, the manager who examined the bill, and the officers who responded to the scene had never seen a pre-1991 100 dollar bill before.[72] The bill Mr. Rodis presented lacked the security thread, watermarks, microprinting, and other anticounterfeiting

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[2] The district court noted that Officer Liddicoet testified that the bill looked real to her. However, a review of the record shows that Liddicoet testified that the bill did not look real.

features of current 100 dollar bills.[83] The fact that there is another branch of government, the Department of the Treasury, that has agents specifically trained and tasked with detecting counterfeit bills shows that the average street-level officer is not held to have infallible counterfeit detection skills. The fact that a clerk, and the manager both continued to think that the bill was counterfeit indicates that the officers' mistake was objectively reasonable. That we have a different view of the evidence should not change our analysis. *See Hunter v. Bryant,* 502 U.S. 224, 226-27 (1991) (reversing the Ninth Circuit's refusal to grant qualified immunity because officials are entitled to an accommodation for reasonable error as a matter of law). Although qualified immunity does not protect "the plainly incompetent," in this case the failure of the officers to recognize an outdated bill lacking modern security features was not plainly incompetent, but rather an unfortunate mistake that any reasonable officer could have made. *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

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[3] The Treasury introduced security thread and microprinting in $50 and $100 bills in 1990 to deter counterfeiting. *See* Federal Reserve Bank of San Francisco, http://www.frbsf.org/federalreserve/money/funfacts.html (last accessed August 9, 2007). The Treasury also redesigned and added new security features to the $100 bill in 1996. *Id.*

B. The majority improperly uses the standards for conviction in creating a new standard for probable cause to arrest under 18 U.S.C. § 472.

Assuming the mistake of fact does not completely dispose of Mr. Rodis's claim, the majority opinion improperly imposes the government's burden of proof at trial on the probable cause inquiry. "Probable cause must be evaluated from the viewpoint of prudent and cautious police officers on the scene at the time of arrest." *Long v. United States*, 422 F.2d 1024, 1026 (9th Cir. 1970). "The issue is whether police officers, acting together, in particular circumstances, all conditioned by their observations and information and guided by their total police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Id.* Our court has acknowledged time and time again that "[p]robable cause exists when there is a fair probability or substantial chance of criminal activity." *United States v. Rodriquez*, 464 F.3d 1072, 1078 (9th Cir. 2006) (quoting *United States v. Soriano*, 361 F.3d 494, 505 (9th Cir. 2004)). The Supreme Court has long held that "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972); *see also Draper v. United States*, 358 U.S. 307, 311-12 (1959).

Yet the majority does precisely that by stating that "[i]t was clear well before Rodis's arrest that '[t]o support a *conviction* for possession of counterfeit

currency with intent to defraud under . . . § 472, the government must prove three elements: (1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) possession with intent to defraud.'" (emphasis added) (Maj. Op. at 10678) (quoting *United States v. Rodriguez*, 761 F.2d 1339, 1340 (9th Cir. 1985)). The majority cites over and over cases concerning what must be proven at trial to sustain a conviction under 18 U.S.C. § 472, not cases specifically stating what is required for probable cause to believe that a person has attempted to pass a counterfeit note with intent to defraud. (Maj. Op. at 10678, 10679-80.) The government's burden at trial is not the same as the standard for probable cause. Conflating the two and imposing a new requirement that officers must have conclusive evidence of specific intent in order to have probable cause to arrest violates the basic principles of qualified immunity in arrest cases.

C. Under existing law, the officers had probable cause to arrest Mr. Rodis on suspicion that he violated 18 U.S.C. § 472; therefore they did not violate his constitutional rights.

So what was the proper inquiry for analyzing whether the officers had probable cause to arrest Mr. Rodis? In *Everett*, 719 F.2d at 1120, the Eleventh Circuit held that, "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note." "Generally,

probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note." *United States v. Hernandez,* 825 F.2d 846, 849 (5th Cir. 1987). In *United States v. Blum,* 432 F.2d 250, 251-53 (9th Cir. 1970), we upheld a finding of probable cause based on a merchant's report that he received bills he believed were counterfeit, and the officer's examination of the bills. The arrest in that case was based solely on the report of the service station owner, his description of the suspect and the suspect's car, and the officer's examination of the bill and determination that it was a counterfeit bill. *Id.* at 251-52. A bulletin was broadcast on the radio, and an officer arrested the defendant without a warrant a short time later. *Id.* at 252. After discussing the probable cause standard at length, this court affirmed the denial of a motion to suppress, stating "we conclude that on the basis of the facts and circumstances known to the police officers involved, or as to which they had reasonably trustworthy information, that probable cause existed for Blum's arrest." *Id.* at 253.

Nothing in our case law undermines the premise of *Blum,* or the Fifth and Eleventh Circuit's determination that probable cause that a person violated 18 U.S.C. § 472 is satisfied upon the attempted passing of an apparently counterfeit note and the identification of the person who tried to pass the note. *See also United States v. Allison,* 616 F.2d 779, 782 (5th Cir. 1980) (concluding that officer's lack of firsthand

knowledge concerning defendant's intent to defraud does not eliminate probable cause created by reliable information that possessor attempted to pass bill as genuine); *United States v. McCoy,* 517 F.2d 41, 43 n.1 (7th Cir. 1975) ("[T]he record clearly shows that the arresting officer had knowledge of facts – namely, that McCoy had attempted to acquire merchandise in exchange for a counterfeit bill – which established probable cause to believe that appellant had violated § 943.38 of the Wisconsin Criminal Code (Forgery)."). Because "[i]ntent and knowledge may be inferred from [a suspect's] overall actions," the officers had probable cause to arrest him, and did not have to have probable cause of Mr. Rodis's specific intent to defraud. *United States v. Lorenzo,* 570 F.2d 294, 299 (9th Cir. 1978). An attempt to pass a counterfeit bill, even if the bill is recognized and rejected, is sufficient to sustain the intent element for the purposes of a conviction. *See id.* at 295-96, 299 (noting waitress rejected counterfeit bill, but sustaining conviction); *see also United States v. McCall,* 592 F.2d 1066, 1068 (9th Cir. 1979) (affirming conviction where the defendant told inconsistent stories about the source of the counterfeit bills, even though the manager detected the counterfeit bill and called police immediately). Even the case cited by the majority, *United States v. DeFilippis,* 637 F.2d 1370, 1373 (9th Cir. 1981), declined to impose any additional elements, or to raise the burden of proof to sustain a conviction under 18 U.S.C. § 472. Based on well-established principles concerning probable cause, and case law specifically holding that officers have probable cause

to arrest someone on suspicion of having violated 18 U.S.C. § 472 if there is evidence of the passing of an allegedly counterfeit note and the identification of a suspect, I would conclude that the officers did not violate Mr. Rodis's constitutional right to be free from arrest absent probable cause.

Applying the majority's newly announced standard will also result in absurd results. If a suspect simply says that he does not know if the bill is real or fake, or if he carries around a real bill and offers to substitute it for the counterfeit one, officers may not arrest him to investigate the probable unlawful conduct. In the case of a clever criminal who is skilled at lying, officers would be powerless to arrest the suspect even when he attempts to pass a clearly counterfeit bill, if the suspect verbally disavows knowledge or intent and pays with a legitimate bill. A criminal could test the counterfeit detection skills of clerks, bartenders, and other consumers at will without fear of arrest.

Imposing a requirement that asks officers to read criminals' minds to discern their subjective knowledge and intent is not practical or grounded in reality. Intent to defraud is often established through evidence concerning knowledge such as additional counterfeit bills, reproduction equipment, plates, ledgers, and other evidence that officers would no longer be able to gather incident to arrest or through a search warrant. For example, if the bill in this case happened to be counterfeit, further investigation would have established that Mr. Rodis genuinely lacked the

specific intent to defraud, making him a victim of counterfeiting. Detectives, or more likely Secret Service agents, would then investigate to determine the origin of the bill, and hopefully arrest the counterfeiters.

In this particular case, however, the officers made the reasonable mistake of failing to recognize a genuine pre-1991 100 dollar bill. The majority uses this mistake to impose a new, higher standard for probable cause based on the elements necessary to sustain a conviction, instead of concentrating on whether it is more probable than not that a crime occurred under these circumstances. (Maj. Op. at 10678, 10679-80.) I would follow our prior decision in *Blum,* as well as the rulings in other circuits establishing the standard for probable cause for violations of 18 U.S.C. § 472 and conclude that the officers did not violate Mr. Rodis's Fourth Amendment rights because they had sufficient probable cause for the arrest.

D. There is no constitutional requirement that an officer fully investigate a suspect's defenses, including his lack of the required mental state, before arrest.

As an additional justification for concluding that the officers did not have probable cause, the majority faults the officers' investigation under the circumstances, arguing that certain facts reduced the probability that Rodis had the specific intent necessary to secure a conviction. (Maj. Op. at 10679-80.)

This argument concerning inadequate investigation of the intent element is foreclosed by *Baker v. McCollan,* where the Supreme Court granted qualified immunity after the arrest and detention of a suspect in a case involving mistaken identity. "[I]nnocence of the charge . . . is largely irrelevant to [a] claim of deprivation of liberty without due process of law." *Baker,* 443 U.S. at 145. "The Constitution does not guarantee that only the guilty will be arrested." *Id.* An arresting officer is not "required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity *or a defense such as lack of requisite intent.*" (emphasis added) *Id.* at 145-46. "Nor is the official charged . . . to perform an error-free investigation of such a claim." *Id.* at 146. "The ultimate determination of such claims of innocence is placed in the hands of the judge and jury." *Id.*

Consistent with *Baker,* the officers were allowed to arrest Mr. Rodis because they had objective evidence that Mr. Rodis attempted to pass the note, and Mr. Rodis did not contest the clerk and the manager's statements that he attempted to pay for goods with the suspicious note even though the clerk, the manager, and the officers were mistaken and the note turned out to be genuine. After further investigation, the officers discovered their mistake and released Mr. Rodis. The officers were not constitutionally required to conduct an exhaustive investigation into Mr. Rodis's state of mind before making an arrest. *See id.* at 145-46; *see also Marks v. Carmody,*

234 F.3d 1006, 1009-10 (7th Cir. 2000) (concluding officers acted reasonably in arresting even though suspect presented evidence tending to show that he lacked the intent to defraud); *United States v. Bertram*, 719 F.2d 735, 737-38 (5th Cir. 1983) (rejecting defendant's argument that officers lacked probable cause to arrest because the counterfeit Krugerrands had the word "copy" on them, making it impossible for him to defraud anyone). Nor was the officers' mistake of fact a violation of Mr. Rodis's constitutional rights. Therefore, I would hold that the officers were entitled to qualified immunity because they did not violate Mr. Rodis's Fourth Amendment rights.

II. The majority's opinion announces a new principle that officers must have specific evidence of intent to defraud in order to have probable cause to arrest; therefore, the law was not clearly established and the officers were entitled to qualified immunity.

This is precisely a case where "an official could not reasonably be expected to anticipate subsequent legal developments." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As noted above, the case law in this and other circuits, prior to today's holding, uniformly stated that the standard for probable cause to arrest on suspicion of violating 18 U.S.C. § 472 required only 1) an attempt to pass an allegedly counterfeit note, and 2) an identification of the person who attempted to pass the note. *See Blum*, 432 F.2d at

251-53; *Everett*, 719 F.2d at 1120; *United States v. Sheppard*, 455 F.2d 1081, 1083 (10th Cir. 1972); *see also United States v. Ford*, 461 F.2d 534 (9th Cir. 1972) (per curiam) (noting attempt to pass counterfeit money, a description of the suspect by a storekeeper, and the key exhibit falling out of the suspect's pocket as supporting probable cause); *Bates v. United States*, 352 F.2d 399, 399-400 (9th Cir. 1965) (per curiam) (discussing identification of suspect). Our own cases involving other statutes that require intent to defraud do not require officers to accept a suspect's version of events or to determine whether he actually had that intent. *See United States v. Mayo*, 394 F.3d 1271, 1276 (9th Cir. 2005) (affirming a finding of probable cause to arrest for "placing a stolen registration sticker on a license plate, with intent to defraud" where there was "no dispute that Mayo admitted that he was driving the car that day, was in the process of buying it, and had been in possession of it for the last month"); *United States v. Thomas*, 835 F.2d 219, 222 (9th Cir. 1987) (discussing act and identity).[9] The Eleventh Circuit recently reiterated in a § 1983 false arrest case that "even for a criminal statute that requires proof of an intent to defraud for a conviction, an arresting officer does not need evidence of the

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[9] The majority cites two cases, *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1499 (9th Cir. 1996) and *Gasho v. United States*, 39 F.3d 1420, 1429 (9th Cir. 1994) where the specific intent required was a form of specialized knowledge. For intent to defraud cases, the specific intent is usually inferred from the act itself.

intent for probable cause to arrest to exist." *Jordan v. Mosley*, 487 F.3d 1350, 1356 (11th Cir. 2007).

In essence, the specific intent to defraud is inferred from the attempted passing of the bill. It is the rare case that a person intending to defraud will admit it. The case law discussed above concerning the lack of a duty to investigate a suspect's proffered defense of a lack of intent exists precisely because almost every suspect – innocent or not, will profess a lack of intent. The majority's additional requirement that the officer have some conclusive level of evidence of intent to defraud is inconsistent with these precedents.

The majority cites to no case specifically requiring that officers have explicit evidence of a suspect's subjective intent to defraud before they have probable cause to arrest on suspicion of violating 18 U.S.C. § 472. This lack of precedent to support the majority's approach is telling, and I cannot find that an officer must have conclusive evidence of intent to defraud before arresting a suspect was clearly established. In my view, the case law allowing officers to infer the intent to defraud from the attempted passing of the counterfeit note is sufficient to establish probable cause was the clearly established law prior to this decision. We cannot expect the officers to anticipate the majority's ruling that they should have had explicit and conclusive evidence of the suspect's subjective intent to defraud prior to arrest, because it is found nowhere else in any federal court's jurisprudence concerning probable

cause to arrest under 18 U.S.C. § 472. Therefore, I cannot join in the majority's conclusion that such a requirement was clearly established prior to today, and I would grant the officers qualified immunity.

What happened to Mr. Rodis was an unfortunate mistake. We cannot allow bad facts to make bad law. Simple and reasonable mistakes of fact are not constitutional violations, however, nor should a mistake subject the officers to a lawsuit under 42 U.S.C. § 1983. The case law simply does not support the majority's view that probable cause to arrest under 18 U.S.C. § 472 requires specific and conclusive evidence of a suspect's subjective intent to defraud. The majority's error is compounded by the fact that it fails to recognize that it is adding a wholly new requirement to the probable cause inquiry that has no support anywhere in federal statutory or case law, and therefore cannot be clearly established. I would vacate the district court's order and remand with instructions to grant the officers qualified immunity from suit and grant their motion for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODEL E. RODIS,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipality,

Defendant-Appellant,

LIDDICOET, San Francisco Police Officer; et al.,

Defendants-Appellants,

and

SAN FRANCISCO POLICE DEPARTMENT,

Defendant.

No. 05-15522

D.C. No. CV-04-00314-MMC
Northern District of California, San Francisco

ORDER

(Filed Apr. 17, 2009)

Before: D.W. NELSON and CALLAHAN, Circuit Judges, and CARNEY,* District Judge.

Judge Callahan voted to deny the petition for rehearing en banc. Judges Nelson and Carney recommended denial of the petition for rehearing en banc.

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* The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing en banc is denied.

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No. 09-275

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

RODEL RODIS,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, SGT. JEFF BARRY, OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

On remand from this Court for reconsideration in light of *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Ninth Circuit ruled that Respondents Sergeant Jeff Barry and Officer Michelle Liddicoet were entitled to qualified immunity for their arrest of Petitioner Rodel Rodis. The Ninth Circuit correctly reasoned that at the time of the arrest, courts addressing probable cause in the counterfeiting context had validated arrests similar to this one, whereas no court had held that arrests like this one were illegal. As a result, the Ninth Circuit held that the purported illegality of this arrest was not clearly established and that the officers were therefore immune.

Petitioner identifies no circuit conflict, and makes no argument about the nationwide importance of the specific qualified immunity question addressed by the Ninth Circuit. Rather, he asks this Court to grant certiorari to correct what he believes was an erroneous application of the qualified immunity doctrine to the peculiar facts of his case. Although this question does not warrant the Court's review, the Ninth Circuit's ruling was clearly correct in any event.

Petitioner does not identify a single federal appellate decision in which an arrest remotely similar to his was held to violate the Fourth Amendment. He merely contends that the counterfeiting cases cited by the Ninth Circuit that found no Fourth Amendment violation were factually distinguishable. This misses the point. Although all probable cause cases are

distinguishable on their facts, the rule that has emerged from the prior counterfeiting cases cited by the Ninth Circuit is that "probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note." *United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987). In the face of such a rule, and in the absence of any case law contradicting it, the Ninth Circuit was compelled, under *Pearson*, to rule that the officers are entitled to qualified immunity.

* * *

1. On February 17, 2003, Petitioner Rodel Rodis attempted to make a purchase at a Walgreens drugstore in San Francisco with a $100 bill. The cashier suspected the bill was counterfeit because of its odd texture and reported her suspicion to the store manager. The manager, who handles multiple $100 bills every day, examined the bill, compared it to another $100 bill, observed that the bill lacked a magnetic strip and watermark, and therefore agreed with the clerk's suspicion that the bill was counterfeit. Pet. App. 3.

The manager then called 911 to summon the police and informed the 911 dispatcher that he suspected the bill was counterfeit. Several San Francisco police officers – including Sgt. Barry, Officer Liddicoet, Officer James Nguyen, and Officer Barbara Dullea – arrived at the scene in response to that dispatch. The officers arrested Rodis, basing probable cause on several facts. First, the officers independently examined

the bill by touching it and inspecting it visually. Second, the Walgreens employees, experienced in handling currency, communicated their suspicions about the genuineness of the bill. Officer Nguyen spoke with the manager and cashier, who expressed their belief that the bill was counterfeit. The cashier informed Officer Nguyen that Rodis had used the $100 bill to pay for a few small items. The manager told Officer Nguyen he had compared the bill to another $100 bill from the same year. Pet. App. 3.

A Walgreens employee had, prior to the officers' arrival, tested the bill with a counterfeit detector pen, and the pen suggested that the bill was not counterfeit. Pet. App. 3. However, during their investigation, the officers determined that the pen was not working properly. Specifically, Officer Nguyen used it on a folder, and the pen erroneously identified the folder as genuine U.S. currency as well. Pet. App. 3-4. Understandably, the officers therefore did not place much weight on the pen's results.

Based on these facts, the officers determined the bill likely was counterfeit and decided to investigate further by contacting the United States Secret Service for guidance. The San Francisco Police Department has access to a Secret Service hotline for such inquiries, and officers are trained to contact the Secret Service to confirm the authenticity or lack thereof of suspect bills.

The officers conducted this portion of their investigation from the police station. Conducting such

an investigation at the Walgreens store was impractical because the Walgreens office was very small and cramped. In addition, conducting the investigation at the police station would be more effective and less embarrassing for Rodis, given the potential delay in hearing back from the Secret Service. Under standard procedures governing arrests, the officers handcuffed Rodis and transported him to the police station.

After arriving at the station, Officer Nguyen called and left a message for the Secret Service and received a return call from an agent twenty or thirty minutes later. After interviewing Officer Nguyen about the bill, the Secret Service agent informed Officer Nguyen that the bill likely was genuine. Upon learning this information, the officers immediately released Rodis, removed his handcuffs, and drove him back to the Walgreens store in the front seat of the police car. The officers returned the $100 bill to Rodis. The entire incident lasted approximately one hour. Pet. App. 4.

2. On October 1, 2003, Rodis filed suit in the Superior Court of California for the County of San Francisco, against Defendants City and County of San Francisco, then-Chief of Police Alex Fagan (in his official capacity only), Sergeant Barry, and Officer Liddicoet. The complaint alleged a cause of action under 42 U.S.C. section 1983, for violation of Rodis's Fourth Amendment rights, and state-law claims as well. After the City was served, it removed the case to the United States District Court for the Northern District of California. Pet. App. 4-5.

3. The officers and the City moved for summary judgment, and on March 22, 2005, the district court granted the motion in part and denied it in part. Pertinent here, the district court held that Rodis had a viable claim against the individual officers for violation of his rights under the Fourth Amendment and further held that those rights were clearly established at the time of the arrest. The district court thus denied the officers' request for qualified immunity. Pet. App. 14-30.

4. The officers appealed the denial of qualified immunity, and on August 28, 2007, a divided three-judge panel of the Ninth Circuit affirmed the denial of qualified immunity. Pet. App. 31-62. The panel relied on the lack of evidence of Rodis's intent to defraud above and beyond his passing of the suspect bill and concluded that without such evidence, the arrest was illegal and the illegality was clearly established.

5. The officers then petitioned for certiorari. Among other grounds, they argued that the Ninth Circuit had misapplied the doctrine of qualified immunity. They relied on the absence of any case law holding that to have probable cause to arrest, police officers were required to have evidence of intent to defraud above and beyond the passing of the suspect currency. To the contrary, various cases had held that such additional evidence of intent was not required to support probable cause. The officers reasoned, among other things, that the Ninth Circuit's opinion had created a circuit split concerning whether evidence of

intent was required to create probable cause for counterfeit offenses, and therefore that the officers could not be said to have violated clearly established law.

6. On January 26, 2009, this Court granted certiorari, vacated the Ninth Circuit's decision, and remanded the case for reconsideration in light of *Pearson. City and County of San Francisco v. Rodis*, 129 S. Ct. 1036 (2009). In *Pearson*, the Court reversed the Tenth Circuit and found that police officers were entitled to qualified immunity where they relied on the consent-once-removed doctrine to justify their warrantless entry into a home. *Pearson*, 129 S. Ct. at 823. At the time of the officers' entry, the consent-once-removed doctrine had been accepted in several circuits, had never been rejected, and had not been addressed by the Tenth Circuit. The Court reasoned that "where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct." *Id.* at 823.

7. On remand, the Ninth Circuit, per this Court's instruction, reconsidered its qualified immunity ruling in light of *Pearson*. The Ninth Circuit held that the officers were entitled to qualified immunity, as in *Pearson*, because existing case law on the issue supported the legality of the officers' actions whereas no case law defined those actions as illegal. Pet. App. 1-13. Rodis contended that to have probable cause, the officers needed to have evidence of intent to defraud above and beyond the passing of the

currency, whereas the officers contended that the passing of the suspect currency, without more, provided evidence of intent to defraud sufficient to justify an arrest. The court observed that it had never addressed this issue – *i.e.*, whether evidence of intent to defraud above and beyond the passing of the bill was required for probable cause to exist – and that the other circuits that had addressed the issue found that the passing of a counterfeit bill plus the identification of the person who passed the bill were sufficient to create probable cause.

The court relied on this Court's holding in *Pearson* that where other circuits have ruled in a particular way and where a ruling by the court would create a circuit split, qualified immunity applies. The court reasoned that however it ruled on the type of evidence required for probable cause, the ruling would either exonerate the officers or create a new rule and a circuit split that would entitle the officers to qualified immunity. Pet. App. 11-12.

Accordingly, the court declined to reach the issue of what level of evidence is required for probable cause and determined that the officers were immune in light of the evidence in the officers' possession that the bill was suspect. Pet. App. 11-12.

This petition ensued.

REASONS FOR DENYING THE PETITION

I. THE PETITION SEEKS CERTIORARI ON AN ISSUE THAT THE NINTH CIRCUIT DID NOT REACH.

The petition seeks certiorari on an issue that the Ninth Circuit did not decide, specifically, whether evidence of intent to defraud above and beyond the passing of the suspect bill is required to support probable cause for an arrest under section 472. The petition's first question presented for review asks

> Did the Ninth Circuit err in concluding that Respondent police officers, who admit they did nothing to determine Petitioner's intentions, did not have to do so because the mere act of passing a *suspected counterfeit bill*, by and of itself, furnish [sic] police with sufficient probable cause to arrest an individual pursuant to 18 U.S.C. § 472. . . .

However, the Ninth Circuit never reached the issue of what exactly is required to support probable cause for a counterfeiting arrest. Instead, the court followed this Court's approach in *Pearson*: it determined that the alleged illegality of the officers' actions was not clearly established, granted qualified immunity on that ground, and therefore declined to reach the underlying issue of whether the arrest lacked probable cause. Pet. App. 12 ("Because it is unnecessary to disposition of this case, we decline to decide this question.").

As a result, Rodis is asking the Court to grant certiorari on an issue that the Ninth Circuit did not

reach and was not required to reach to decide the case before it. Because the Ninth Circuit appropriately did not rule on the question of whether probable cause existed in this case and because there is no circuit conflict on this question – certiorari on this issue is unwarranted.[1]

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[1] Rodis encourages this Court to grant certiorari because of the purported outrageousness of the arrest. The arrest, however, was not at all outrageous and, in fact, resulted from competent and standard police work. An experienced Walgreens manager called 911 to report the passing of a counterfeit bill – a large bill used to purchase small pharmacy items. The same manager informed the officers that in assessing the odd-looking bill – one without modern security features – he had compared it to a bill from the same year. The counterfeiting detection pen that the manager used was not functioning, given that it showed an officer's notebook to be genuine currency. And, the officers inspected the bill themselves and agreed that the bill was suspect.

Having formulated probable cause, the officers did what officers do: they arrested Rodis and transported him to the station. Rodis makes much of the transport, but there is nothing outrageous about transporting a person who is under arrest. Moreover, had the officers detained Rodis for an hour in public view at the Walgreens in Rodis's own neighborhood, Rodis would be expressing outrage that the officers had chosen to humiliate him by detaining him in a public place.

Rodis also emphasizes Sgt. Barry's alleged animus against him, but in doing so, he badly distorts the facts. Sergeant Barry was peripheral to the arrest. He and Officer Dullea stayed at the periphery throughout the process. Officers Liddicoet and Nguyen were the arresting officers, and it was their decision, not Sgt. Barry's, to arrest Rodis. Rodis himself acknowledged in deposition that Officer Liddicoet appeared to be in charge.

Nor does Sgt. Barry's previous disagreement with Rodis about City College's policy on guns affect the analysis. The

(Continued on following page)

II. THE PETITION DOES NOT PRESENT A QUESTION WORTHY OF CERTIORARI AND INSTEAD MERELY ASKS THIS COURT TO CORRECT A PURPORTED ERROR BELOW.

The petition identifies no circuit conflict on any issue. As discussed above, the Ninth Circuit created no conflict on whether evidence beyond the passing of a counterfeit note is necessary to establish probable cause to arrest, because the court did not decide that question. Nor does the petition identify any conflict on whether, in circumstances like these, the officers are entitled to qualified immunity. Instead, Rodis asks the Court to step in and review what he believes to be an erroneous application of the doctrine of qualified immunity to the peculiar facts of his case.

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conversation at issue took place in 1996, seven years before the incident in this case. Sergeant Barry – a San Francisco voter – told Rodis that he disagreed with Rodis's position prohibiting campus police officers at City College from carrying guns. Sergeant Barry did not yell or make threats when he expressed this view. Rodis testified that he does not think that Sgt. Barry said anything inappropriate in expressing his view. Between this 1996 conversation and the 2003 incident, Rodis and Sgt. Barry had no contact whatsoever.

In light of this chronology and the appropriateness of Sgt. Barry, a San Francisco voter, expressing a legitimate view to Rodis, this conversation is irrelevant, and Rodis's assertion that Sgt. Barry was acting maliciously is baseless. Had Sgt. Barry wanted to hurt Rodis, he would have and could have participated in the arrest. He chose not to do so, and he allowed the arresting officers – Liddicoet and Nguyen – to make all decisions.

The petition goes on at length describing the various out-of-circuit cases that have addressed the issue of probable cause in the counterfeiting context. The petition criticizes the Ninth Circuit for issuing an opinion that is "relatively short" because "the panel did not review the factual contexts and totalities of the circumstances" of those cases. According to the petition, had the court done so, it would have seen that each of the cases contained facts supportive of Rodis's position regarding probable cause.

Even assuming that Rodis's interpretation of these cases is accurate – and it is not accurate – the most the petition argues is for the Court to step in and correct what Rodis considers to be a factual misinterpretation of the out-of-circuit cases and thus an erroneous conclusion that the alleged lack of probable cause was not clearly established. Whether or not Rodis is correct with respect to the Ninth Circuit's reading of specific cases, this is not the type of issue that warrants this Court's attention.

Similarly, Rodis's contention that the Ninth Circuit erred in applying the standard enunciated in *Hunter v. Bryant*, 502 U.S. 224, 229 (1991), is not worthy of certiorari. Rodis asserts that the Ninth Circuit analyzed the officers' conduct under the first *Hunter* prong – whether the officers were "plainly incompetent" – without considering the second prong – whether the officers "knowingly violate[d] the law." Pet. 25. According to Rodis, the officers knowingly violated the law in light of Sgt. Barry's supposed personal animus toward Rodis and Officer Nguyen's

alleged admission that he knew all along that the bill was valid. Rodis faults the Ninth Circuit for not considering this second prong and these facts. Yet, once again, this issue is no more than a contention that the Ninth Circuit erred in applying the correct test in a specific case. It does not warrant certiorari.

III. THE NINTH CIRCUIT CORRECTLY HELD THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY.

The Court also should deny the petition because the Ninth Circuit's ruling was correct. Only through a distortion of the doctrine of qualified immunity is Rodis able to argue otherwise.

Rodis's qualified immunity argument is that because the cases cited by the Ninth Circuit on probable cause in the counterfeiting context are all "distinguishable" from this case – *i.e.*, all allegedly have stronger facts supporting probable cause than in this case – qualified immunity does not apply. Rodis analyzes each case at length and explains why each set of facts is stronger than the present case.

Setting aside the distortions in Rodis's lengthy compendium of these cases, Rodis's analysis is irrelevant to the qualified immunity issue. What matters is not whether cases finding probable cause are distinguishable from this case, but rather whether it was clearly established at the time of Rodis's arrest that the facts known to the officers were insufficient to create probable cause. Rodis has not come close to

making that showing. Indeed, the petition does not cite a single case in which a court found probable cause lacking for a counterfeiting arrest based on a dearth of evidence of intent to defraud, nor even a case in which the court found probable cause lacking on any ground.

Rodis's approach to qualified immunity – that it is defeated if no case squarely supports the legality of the officers' actions – turns the doctrine on its head. To defeat the officers' qualified immunity, Rodis must show that the purported illegality of the officers' conduct was clearly established at the time of the arrest. It is not enough for Rodis to assert (incorrectly, as it turns out) that the *legality* of the officers' conduct was not clearly established. Rather, he must show that the *illegality* was clearly established. *See Pearson*, 129 S. Ct. at 822.

Rodis does not even attempt to carry that burden. No case held, at the time of Rodis's arrest, that specific evidence of intent beyond the passing of a counterfeit note is required to create probable cause. To the contrary, various cases, including those cited by the Ninth Circuit and Rodis himself, held that all that is required to support a counterfeiting arrest is evidence that the bill is counterfeit and that the arrestee is the person who passed the bill. *See United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987) ("Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who

passed the note."); *United States v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983) ("While intent is an element of the crime which must be proved at trial, it is not necessary in order to establish probable cause to arrest. The passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note."); *United States v. Allison*, 616 F.2d 779, 782 (5th Cir. 1980) ("Although mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed.").

Where cases have validated a particular kind of law enforcement action and where no cases have found it illegal, qualified immunity protects officers from liability:

> When the entry at issue here occurred in 2002, the "consent-once-removed" doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. . . . It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. . . . The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, . . . and prior to the Tenth

> Circuit's decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.

Pearson, 129 S. Ct. at 822-23.[2]

The Ninth Circuit correctly ruled that based on the law as it existed at the time of the arrest (and as it exists today), the alleged illegality of the officers' action was not clearly established. As a result, even if the Court were inclined to take up Rodis's invitation

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[2] Rodis criticizes the Ninth Circuit for failing to cite any cases in which the suspicious bills turned out to be valid or cases concerning upstanding citizens like Rodis. Pet. 23-24. This argument lacks merit, given the irrelevance to the probable cause inquiry about whether the officers ended up being mistaken and the extreme irrelevance of the social standing of the suspect.

Rodis even goes so far as to suggest that to have probable cause to arrest for passing a counterfeit bill, the bill at issue must be "confirmed" as counterfeit, not merely "suspected." Pet. 32. This argument contradicts basic concepts of probable cause. Probable cause does not require that elements of a crime be established. Rather, it focuses on probabilities. *See Illinois v. Gates*, 462 U.S. 213, 235 (1983).

to engage in error correction, the Court still should deny certiorari given the lack of any error below.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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No. 09-275

Supreme Court, U.S.
FILED
DEC 15 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RODEL E. RODIS,

Petitioner,

v.

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONER'S REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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STATUTES

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1. Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari fails to identify anything in this Court's decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), or in the Order of this Court remanding this case to the Ninth Circuit Court of Appeals in light of this Court's decision in the *Pearson* case decision, which authorized the Ninth Circuit to reverse its previously published conclusion that the law Respondents are alleged to have violated was well-established law at the time they arrested Petitioner.

The decision of this Court in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), did not address or involve in any manner 42 U.S.C. § 472, and this Court's remand to the Ninth Circuit for reconsideration of its previously published decision in view of *Pearson*, must result in a decision that was reconsidered in light of *Pearson*. The decision issued by the Ninth Circuit did not do that.

Since *Pearson* had absolutely nothing to do with 42 U.S.C. § 472, the remand by this Court to the Ninth Circuit for reconsideration of its decision in view of *Pearson*, did not authorize the Ninth Circuit to reverse itself on issues not involved in the *Pearson* case. The *Pearson* case established that the two-prong analysis in *Saucier v. Katz*, 522 U.S. 194 (2001) involving claims of qualified immunity, did not have to be considered by the Court in a specific sequence. The Ninth Circuit having previously published its conclusion with respect to the existence of each of the *Saucier* prongs, should have held that since each of

the prongs in the *Saucier* analysis have been established, and since the sequence in which these prongs were previously considered and decided by the Court, in light of *Pearson*, did not affect its prior decision that its previously published decision was Affirmed.

2. Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari incorrectly states that the Ninth Circuit was compelled under *Pearson*, to rule that Respondents are entitled to quantified immunity. The *Pearson* decision established that the two-prong analysis set forth in the case of *Saucier*, did not have to be followed in a particular sequence. Assuming *arguendo*, that the Ninth Circuit correctly reconsidered whether Respondents' actions violated well-established law at the time they arrested Petitioner, it will have national consequence for any person who was, or will be, arrested for innocently passing counterfeit currency, or as in the present case, who has or will be arrested for suspicion of counterfeit currency that is not counterfeit. Respondents' opposition brief introduces to this Court the same arguments and cases it presented to the U.S. District Court before it denied their motion for summary judgment, and to the Ninth Circuit before it issued its published decision affirming the District Court's Order, but fails to even discuss the two decisions, one published, which analyzed and resolved those arguments.

The reasoning and conclusions in these two decisions adequately addressed and resolved those arguments, in Petitioner's favor.

The Court should grant this Petition for a Writ of Certiorari, or similarly reverse the Ninth Circuit.

Respectfully submitted,

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December 15, 2009